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Civil Procedure

University of the Pacific; McGeorge School of Law

Civil Procedure

Civil Procedure; discovery

Code of Civil Procedure §2033 (repealed);
§2030 (amended).
SB 638 (Song); STATS 1977, Ch 500
Support: Los Angeles Board of Supervisors

Prior to the enactment of Chapter 500 the Code of Civil Procedure specified procedures governing requests for admissions and interrogatories in two separate code sections [*See* CAL. STATS. 1974, c. 732, §2 at 1618 (requests for admissions of facts and genuineness of documents); CAL. STATS. 1974, c. 732, §2, at 1620 (interrogatories)]. Chapter 500 streamlines the procedural requirements applied to both of these discovery devices while combining coverage of both devices into a single code section [*See* CAL. CIV. PROC. CODE §2030].

Chapter 500 makes no changes in the bases for permissible discovery [*See* CAL. CIV. PROC. CODE §2030(b)(1)], the substance and nature of the subject matter that may be covered by requests for admissions [*See* CAL. CIV. PROC. CODE §2030(h)] and interrogatories [*See* CAL. CIV. PROC. CODE §2030(g)], or the time limits imposed upon parties propounding [*See* CAL. CIV. PROC. CODE §2030(b)(1), (d)], or responding [*See* CAL. CIV. PROC. CODE §2030(c), (f)], except that, with respect to requests for admissions, the time for response has been changed from 20 days to 30 days [*Compare* CAL. STATS. 1974, c. 732, §2, at 1620 *with* CAL. CIV. PROC. CODE §2030(e)(2)]. The format of the propounding and responding documents are, however, changed considerably. "Propounding document" is the term ascribed to either a set of written interrogatories or a set of written requests for admissions of facts and genuineness of documents [CAL. CIV. PROC. CODE §2030(a)(3)] and the requester is deemed the "propounding party" [CAL. CIV. PROC. CODE §2030(a)(1)]. The answer to a propounding document is now termed a "responding document" [CAL. CIV. PROC. CODE §2030(a)(4)], while a document filed in compliance with an order of the court compelling answers to questions previously propounded and either not answered or not answered adequately is a "supplemental document" [CAL. CIV. PROC. CODE §2030(a)(5)]. The party answering in either context is the "responding party" [CAL. CIV. PROC. CODE §2030(a)(2)].

Propounding Documents

A propounding document may now be addressed to *one* party only and must be in the following form: (1) documents must be paginated and num-

bered consecutively; (2) no more than four questions may appear on each page; (3) questions may not be subdivided; and (4) reasonable space must be provided on the document for an answer to be entered below each question [CAL. CIV. PROC. CODE §2030(b)(2)]. Service of a propounding document is to be in person or by mail in the manner prescribed for serving notices and is to be made upon the attorney of record or the responding party *only* if there is no attorney of record to be served [CAL. CIV. PROC. CODE §2030(i)(2), *see* CAL. CIV. PROC. CODE §§1010-1020].

If a propounding party finds that any response is objectionable and an answer or further answer is required, he or she may move for a court order compelling such answers [CAL. CIV. PROC. CODE §2030(d)]. This motion for further response made by a propounding party must now set forth, in relation to each response found objectionable: (1) the number of each question; (2) the question; (3) the response; and (4) a short statement of the reasons the original response is deemed insufficient [CAL. CIV. PROC. CODE 2030(d)].

Responding Documents

The responding party is to subscribe each page of the propounding document under oath and respond to each question in the space provided on the propounding document. If the space provided for response is insufficient, the responding party may append additional pages as necessary and such pages are to be: (1) paginated consecutively by alphabet; (2) inserted immediately following the page that propounded the question; and (3) each signed by the responding party [CAL. CIV. PROC. CODE §2030(c)]. Service of responding documents must now be made either personally or by certified mail in the same manner as that required for service of a summons and complaint [CAL. CIV. PROC. CODE §2030(i)(1). *See generally* CAL. CIV. PROC. CODE §415.10]. This appears to distinguish the service of responding documents in that such service must now include a notice and acknowledgment of receipt as prescribed by Section 415.30(b), which is not a requirement for the service of propounding documents. Upon receipt of the responding document the propounding party must prepare and serve a copy of these documents upon each party who has appeared in the action, absent a ruling by the court, upon a motion of the propounding party that compliance with such a requirement is unduly expensive, oppressive, or burdensome [CAL. CIV. PROC. CODE §2030(i)(3)]. Even after waiver of the requirement, however, any party not previously served with a copy of a responding document may make written demand for service anytime before final judgment to which the propounding party must respond within 30 days [CAL. CIV. PROC. CODE §2030(i)(3)]. Chapter 500 extends the time limit for responding to requests for admissions from 20 days to 30 days, but con-

tinues to provide that failure to respond to such a request within the permissible time will result in all requested admissions being deemed admitted [CAL. CIV. PROC. CODE §2030(e)(2)]. Failure to respond to written interrogatories in a timely fashion permits the propounding party to seek legal sanction upon notice and motion [CAL. CIV. PROC. CODE §2030(e)(1); *see, e.g.*, CAL. CIV. PROC. CODE §§1209(5), 2034].

The procedure to be followed by a propounding party who seeks a court order to compel a further answer by a responding party remains unchanged [*See* CAL. CIV. PROC. CODE §2030(d)], but a responding party conforming to a court order for supplemental response must, within 30 days, file a supplemental document that shall contain, as to each question ordered answered: (1) the original number of the question as shown in the propounding document; (2) the question followed by the answer; and, (3) if there is more than one question ordered to be answered, the questions in serial order by original number followed by the answer [CAL. CIV. PROC. CODE §2030(f)].

General Provisions

Prior to the enactment of Chapter 500, both requesters and responders were required to file copies of the first page and any other pages of the discovery documents for which they were responsible as was necessary to identify the parties concerned as well as the original affidavit of service pertaining to the copied document with the clerk of the court or the judge [CAL. STATS. 1974, c. 732, §1, at 1619 (interrogatories); CAL. STATS. 1974, c. 732, §2, at 1621 (requests for admissions of facts and genuineness of documents)]. Chapter 500 waives the filing of proof of service unless a party seeks relief in which service is an issue at which time a copy of the proof is to be incorporated in the supporting papers [CAL. CIV. PROC. CODE §2030(i)(4)]. Furthermore, the propounding or responding attorneys are now directed to retain any document they prepare for not less than five years after final disposition of the action in lieu of completing the former filing procedure [CAL. CIV. PROC. CODE §2030(1)]. Finally, the Court *may* order the filing of a propounding or responding document [CAL. CIV. PROC. CODE §2030(j)], but must order that a propounding document be furnished to *any* person requesting it, even though the requester is not a party to the litigation [CAL. CIV. PROC. CODE §2030(k)].

Chapter 500 therefore appears to have made major alterations in California discovery procedures by prescribing a consistent format for the preparation of interrogatories and requests for admissions and the responses to them and by eliminating the necessity for filing copies of discovery documents with the court in the absence of an immediate need. These two alterations arguably streamline the discovery procedures in the California court system.

See Generally:
1) B. WITKIN, CALIFORNIA EVIDENCE, *Discovery and the Production of Evidence*, §§978-989 (interrogatories), §§1004-1010 (request for admission), (2nd ed. 1966); §§978-988 (interrogatories), §§1004-1010 (request for admission) (Supp. 1977).

Civil Procedure; intervention

Code of Civil Procedure §387 (amended).
SB 750 (Holden); STATS 1977, Ch 450
Support: Legal Affairs Unit, NAACP; State Bar of California

Prior to the enactment of Chapter 450, the right of persons to intervene in an action in which they had an interest was apparently a matter solely within the discretion of the courts and not an absolute right under any circumstances [People v. Superior Court, 17 Cal. 3d 732, 737, 552 P.2d 760, 763, 131 Cal. Rptr. 800, 803 (1976); People v. City of Long Beach, 183 Cal. App. 2d 271, 274, 6 Cal. Rptr. 658, 660 (1960); *In re* Yokohama Specie Bank, Ltd., 86 Cal. App. 2d 545, 554, 195 P.2d 555, 560 (1948)]. Intervention occurs "when a third person is *permitted* to become a party to an action or proceeding between other persons" [CAL. CIV. PROC. CODE §387 (emphasis added)]. In determining whether intervention should be permitted the California courts have balanced the interests of the original parties in pursuing their litigation unburdened by additional parties, against the need to obviate delay and multiplicity of suits, and the proposed intervenor's interest, which must be of such direct and immediate character that he or she will either gain or lose by the direct legal operation and effect of the judgment [*See, e.g.*, People v. Superior Court, 17 Cal. 3d 732, 736, 552 P.2d 760, 762, 131 Cal. Rptr. 800, 802 (1976); Fireman's Fund Ins. Co. v. Gerlach, 56 Cal. App. 3d 299, 303, 128 Cal. Rptr. 396, 398 (1976); Continental Vinyl Products Corp. v. Mead Corp., 27 Cal. App. 3d 543, 549, 552, 103 Cal. Rptr. 806, 810, 812 (1972)]. Under prior law, however, it was unclear at what time during a legal action intervention was to take place since Section 387 of the Civil Code previously stated that a complaint in intervention could be filed "[a]t any time before trial" [CAL. STATS. 1970, c. 484, §1, at 961], while on the other hand, at least one court has permitted intervention after the commencement of the trial requiring only that the right to intervene be asserted within a reasonable time [Sanders v. Pacific Gas & Elec. Co., 53 Cal. App. 3d 661, 666, 668-69, 126 Cal. Rptr. 415, 418, 420 (1975); 3 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §201 (Supp. 1977)]. Thus, prior to the enactment of Chapter 450, an individual had no absolute right to intervene under any circumstances and in most cases could attempt to intervene only during the "time before trial" [*See* CAL. STATS. 1970, c. 484, §1, at 961].

While Chapter 450 continues to leave the determination of when interven-

tion should be permitted to the sound discretion of the trial court [*Compare* CAL. STATS. 1970, c. 484, §1, at 961 *with* CAL. CIV. PROC. CODE §387(a)], the law now also recognizes that a party may have an absolute right to intervene under certain circumstances [*See* CAL. CIV. PROC. CODE §387(b)]. A court *must now permit* a party to intervene upon timely application when the law confers an unconditional right to intervene [CAL. CIV. PROC. CODE §387(b)]. Such an unconditional right has been conferred, for example, upon all those with an interest in land subject to an eminent domain proceeding [CAL. CIV. PROC. CODE §1250.230], upon all creditors in an action on shareholders liability to a corporation [CAL. CORP. CODE §414], and upon any shareholder or creditor in a proceeding to dissolve a corporation [CAL. CORP. CODE §1800(c)]. Furthermore, a court must now permit a party to intervene when: (1) the party seeking intervention claims an interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may impair or impede the party's ability to protect that interest; and (3) that interest is not adequately represented by existing parties [CAL. CIV. PROC. CODE §387(b)]. In addition, Section 387, as amended by Chapter 450, appears to resolve some of the ambiguity surrounding the deadline for seeking intervention by no longer restricting such applications to the "time before trial" and instead permitting intervention "upon timely application" of any person with the requisite interest in the action [*See* CAL. CIV. PROC. CODE §387]. It would appear that the courts would deem such an application "timely" if: (1) the application was submitted with a reasonable period of time after the applicant learned that the action was in progress; (2) no delay in the trial would be caused by the proposed intervention; and (3) the proposed intervention would not result in any prejudice or inconvenience to the original parties [*See* Sanders v. Pacific Gas & Elec. Co., 53 Cal. App. 3d 661, 668-69, 126 Cal. Rptr. 415, 420 (1975)]. Thus, by adopting a rule that provides an absolute right to intervene under specified circumstances and by retaining a conditional right to intervene in other cases upon the timely application of interested parties, Chapter 450 would appear to conform Section 387 to Rule 24(a) and 24(b) of the Federal Rules of Civil Procedure.

COMMENT

Chapter 450 was enacted in apparent response to the denial of motions to intervene under circumstances such as those in *DeRonde v. Regents of the University of California* [No. 3 Civ. 16872 (June 20, 1977) (briefing time deferred pending the U.S. Supreme Court decision in Bakke v. Regents of the University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted,* 97 S. Ct. 1098 (1977)]. In *DeRonde,* the trial court found that the admissions procedures of the University of California,

Davis, School of Law were discriminatory and enjoined the school from utilizing lower standards to admit minorities into the study of law [*See* Pre-argument statement for intervenors at 4, DeRonde v. Regents of the University of California, No. 3, Civ. 16872 (copy on file at *Pacific Law Journal*)]. Although it would appear that women and members of minority groups might have had a "direct" interest in such admission procedures and the litigation before the court, and the defense of such an interest might have necessitated a separate action if the motions to intervene were not granted, the trial court nonetheless denied all movant's motions to intervene [*See id.* at 5-6]. In addition, any determination that such admissions procedures were unconstitutional might tend to "impair or impede" the rights of some female and minority group applicants [*See id.* at 5], whose interests may not have been "adequately represented" by the University. Thus, by conforming Section 387 to Rule 24(a) and 24(b) of the Federal Rules of Civil Procedure, Chapter 450 would appear to expand the time period within which any interested person may seek intervention in an action and to provide potential parties under certain circumstances, such as those present in the *DeRonde* case, with an absolute right to intervene.

See Generally:

1) 3 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§193-215 (intervention) (2d ed. 1971), (Supp. 1977).
2) Note, *Appealability of Orders on Motions to Intervene,* 15 HASTINGS L.J. 117 (1963).

Civil Procedure; bifurcated trials—precedence of issues

Code of Civil Procedure §598 (amended).
AB 295 (Fenton); STATS 1977, Ch 57
Support: State Bar of California

Prior to the appellate court decision in *Cook v. Superior Court* [19 Cal. App. 3d 832, 97 Cal. Rptr. 189 (1971)], California courts had indicated that they possessed the inherent discretionary power to bifurcate or separate the trial of issues pursuant to Section 2042 of the Code of Civil Procedure, which provides that "[t]he order of proof must be regulated by the sound discretion of the court" [Donovan v. Security-First Nat'l Bank, 67 Cal. App. 2d 845, 852, 155 P.2d 856, 860 (1945), *overruled on other grounds*, Rader v. Thrasher, 57 Cal. 2d 244, 251, 368 P.2d 360, 364, 18 Cal. Rptr. 736, 740 (1962); Booth v. Bond, 56 Cal. App. 2d 153, 155-57, 132 P.2d 520, 522 (1942)]. Subsequently, Section 2042 was superseded by Section 320 of the Evidence Code, which states that "*[e]xcept as otherwise provided by the law*, the court in its discretion shall regulate the order of proof" (emphasis added). Based upon this language, the court in *Cook* concluded that the power to order the trial of one issue before others was

limited to statutory grants of such power [*See* Cook v. Superior Court, 19 Cal. App. 3d 832, 834, 97 Cal. Rptr. 189, 190 (1971); CAL. CIV. PROC. CODE §§597, 597.5, 598]. Because the issue sought to be tried separately in *Cook* involved proofs of damage as well as liability, the court held that to try that issue first would not be a trial on the issue of "liability" alone, as required by Section 598 of the Code of Civil Procedure [Cook v. Superior Court, 19 Cal. App. 3d 832, 834, 97 Cal. Rptr. 189, 190 (1971)].

Subsequent to the *Cook* decision and prior to enactment of Chapter 57, *only* the issues of liability in personal injury cases and special defenses, such as the statute of limitations and other defenses not involving the merits of the plaintiff's cause of action could be tried separately before others [*See* CAL. STATS. 1963, c. 1205, §1, at 2705; CAL. CIV. PROC. CODE §§597, 597.5]. Chapter 57 permits the courts, upon noticed motion and after a hearing on the motion, to bifurcate and try *any issue* before any others, except special defenses, which may be tried first pursuant to Sections 597 and 597.5 [CAL. CIV. PROC. CODE §598]. Chapter 57 continues to limit the court's power to grant a motion to bifurcate to those situations in which "the convenience of witnesses" or the ends of justice would be served [CAL. CIV. PROC. CODE §598]. Since Section 598 now closely resembles Rule 42(b) of the Federal Rules of Civil Procedure, one might safely conclude that under California law the circumstances warranting bifurcation—for "the convenience of witnesses" or to serve "the ends of justice"—would be at least similar to those in which the federal courts have applied Rule 42(b). The federal courts have frequently ordered severance of issues in those situations in which such a procedure would avoid inconvenience, mitigate prejudice, simplify a complex case, or decrease court costs and delay [Comment, *Severance of Issues in Personal Injury Trials: Generally and in Oregon*, 9 WILLAMETTE L.J. 138 (1973)].

Prior to the enactment of Chapter 57, Section 598 provided that the court, on its own motion, could only try the issue of liability before the issue of damages in a nonjury trial [*See* CAL. STATS. 1963, c. 1205, §1, at 2705]. Chapter 57 expands the court's discretion to bifurcate and try any issue before others in both jury and nonjury trials, but expressly limits its application to situations in which *any party to the action has so moved* [CAL. CIV. PROC. CODE §598]. Thus, it would appear that Chapter 57 has restored some of the court's inherent power to regulate the sequence of proof at trial.

Chapter 57 is apparently intended to expedite the judicial process and thereby reduce trial court delay. According to the most recent statistics of the California Judicial Council, delay from the point at which attorneys first request a trial date to the date of trial ranges from a year to a year and one-half in most counties [JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, pt. 2, at 116

(1976)]. Although Chapter 57 is no panacea in the area of trial court delay, based upon the experience of the federal courts with bifurcation of personal injury cases, one study has indicated that "the overall saving could be expected to amount to roughly 18 percent of the court's trial time . . . [which is] equivalent to increasing the number of judges trying those cases by one-fifth" [Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1624 (1963). *Contra*, Note, *Separation of Issues of Liability and Damages in Personal Injury Cases: An Attempt to Combat Congestion by Rule of Court*, 46 IOWA L. REV. 815, 819-20 (1961)]. Although the conclusions of the study apply strictly to personal injury cases, the authors note that "they should prove applicable also to other types of cases" [Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1610 (1963)]. Arguably, a significant savings of time and overall reduction of delay may be expected from use of Section 598 as amended. In addition, the courts may be expected to bifurcate issues to simplify complex cases and avoid possible prejudice occasionally created by extensive joinder of claims [Note, *Separate Trials on Liability and Damges in "Routine Cases": A Legal Analysis*, 46 MINN. L. REV. 1059, 1061 (1962)].

See Generally:
1) 4 B. WITKIN, CALIFORNIA PROCEDURE, *Trial* §§124-28 (prior trial of special defenses and liability) (2d ed. 1971).
2) CONTINUING EDUCATION OF THE BAR, CIVIL PROCEDURE DURING TRIAL §§9.3-.14 (court control of the order of proof and issues) (1960).

Civil Procedure; best evidence rule

Evidence Code §§255, 260, 1511 (new);
§1500 (amended).
SB 1066 (Wilson); STATS 1977, Ch 708
Support: State Bar of California

Chapter 708 amends the "best evidence rule" by deleting the requirement that "the writing itself" be produced in evidence and declaring instead that now "no evidence other than the original of a writing is admissible to prove the content of a writing" [*Compare* CAL. STATS. 1965, c. 299, §2, at 1350 *with* CAL. EVID. CODE §1500], if the contents of the writing are at issue [People v. Marcus, 31 Cal. App. 3d 367, 371, 107 Cal. Rptr. 264, 266 (1973); Hewitt v. Superior Court, 5 Cal. App. 3d 923, 930, 85 Cal. Rptr. 493, 497 (1970)]. Chapter 708 defines an "original" as the writing itself *or* any counterpart intended to have the same effect as the original by a person executing or issuing such a document [CAL. EVID. CODE §255], which is substantially similar to the definition of an "original" currently contained in the Federal Rules of Evidence [*Compare* CAL. EVID. CODE §255 *with* FED.

R. EVID. 1001(3)]. Furthermore, both Chapter 708 and the Federal Rules specify that the "original" of a photograph includes the negative or any print produced from that negative and that any printout or other readable output shown to reflect data stored in a computer is also an "original" [*Compare* FED. R. EVID. 1001(3) *with* CAL. EVID. CODE §255].

In addition, Chapter 708 establishes an exception to this "best evidence rule" in the case of "duplicates," which can be distinguished from "originals" in that they are counterparts that are not intended to have the same effect as an original by the party executing or issuing them [*See* CAL. CIV. PROC. CODE §§255, 260, 1511]. Prior to the enactment of Chapter 708, however, photostatic or photographic copies of a writing were deemed secondary evidence of the content of a writing and thus, were inadmissible under the "best evidence rule" without a showing of unavailability of the original writing [Dugar v. Happy Tiger Records, Inc., 41 Cal. App. 3d 811, 816-18, 116 Cal. Rptr. 412, 415-16 (1974); B. WITKIN, CALIFORNIA EVIDENCE, *Documentary Evidence* §707 (2d ed. 1966)], unless such copies were made and preserved as a part of business records [*See* CAL. CIV. PROC. CODE §1953i; CAL. EVID. CODE §1550]. This interpretation was consistent with California's former version of the "best evidence rule," which declared that "[e]xcept as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing," [CAL. STATS. 1965, c. 299, §2, at 1350. *See generally* CAL. EVID. CODE §§1500-1510]. In light of the purpose of this rule, which is to guarantee the accuracy of evidence introduced to establish the content of a writing at issue [*See* B. WITKIN, CALIFORNIA EVIDENCE, *Documentary Evidence* §688 (2d ed. 1966)], this interpretation is also consistent with the traditional distrust of early, unreliable methods of reproduction, such as hand or letterpress copying [Comment, *Authentication and the Best Evidence Rule under the Federal Rules of Evidence*, 16 WAYNE L. REV. 195, 225 (1969)]. Modern reproduction techniques, such as photographic or photostatic copying, however, have virtually eliminated the possibility of error [*Id.*]. As a result, in 1975 Congress enacted Rule 1003 of the Federal Rules of Evidence to allow such copies to be admissible to the same extent as an original [*See* FED. R. EVID. 1001(4), *Notes of the Advisory Comm. on Proposed Rules*, note to para. 4].

In order to bring California law into conformity with modern technology, Chapter 708 now permits a party to have a "duplicate" of a writing admitted into evidence when: (1) the proponent of such evidence serves written notice upon each party to the proceeding informing him or her that a duplicate will be offered in evidence in lieu of the original; (2) the proponent attaches the duplicate to the notice or describes the writing in the notice and makes the original or duplicate available to each party for inspection or

copying when it is inconvenient or impractical to serve a duplicate on each party; and (3) no party to the proceeding within ten days of being served with such notice serves the proponent with an objection to the duplicate and a demand that the original be produced at the hearing [CAL. EVID. CODE §1511]. The definition of a "duplicate" provided by Chapter 708 is identical to the one provided by the Federal Rules of Evidence and includes any counterpart to the original produced by means of photography or any equivalent technique that accurately reproduces the original [*Compare* FED. R. EVID. 1001(4) *with* CAL. EVID. CODE §260]. Thus, either as products of photography or as accurate reproductions, it would appear that in the absence of a timely objection, Chapter 708 permits the introduction of photographic or photostatic copies of a writing, the contents of which are at issue, regardless of whether the copies were made and preserved as a part of business records [*See* CAL. EVID. CODE §§260, 1500, 1511]. When the analogous Federal Rules were first proposed, it was noted that they would have "the statutory effect of bringing the law into conformity with modern technology" and would "save time and expense previously wasted on producing the original when an equally reliable counterpart is at hand" [Comment, *Authentication and the Best Evidence Rule under the Federal Rules of Evidence*, 16 WAYNE L. REV. 195, 226 (1969)]. It would seem that Chapter 708 could logically be expected to have a similar effect.

See Generally:
1) B. WITKIN, CALIFORNIA EVIDENCE, *Documentary Evidence* §§688-702 (best evidence rule); §§707-709 (photocopies) (2d ed. 1966), (Supp. 1977).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA EVIDENCE BENCHBOOK §§31.1-.5 (best evidence rule) (1972), (Supp. 1975).

Civil Procedure; settlement of suits—sliding scale recovery agreements

Code of Civil Procedure §877.5 (new).
AB 1275 (Knox); STATS 1977, Ch 568
Support: California Hospital Association; California Medical Association; California Trial Lawyers Association

Code of Civil Procedure Section 877 allows a joint tortfeasor to limit his or her liability without releasing the other joint tortfeasors from liability by obtaining a release, dismissal with or without prejudice, or a covenant not to sue or enforce judgment from a plaintiff [CAL. CIV. PROC. CODE §877(a)]. Furthermore, a joint tortfeasor who obtains such an agreement is discharged from any liability for contribution to any other tortfeasor [CAL. CIV. PROC. CODE §877(b)]. As a result of these provisions, in tort cases involving joint defendants, it is often advantageous to both the plaintiff and one or more, but not all defendants, to establish a maximum liability for the agreeing

defendants [*See* Thorton & Wick, *Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, INS. COUNSEL J. 226, 226-28 (April 1976)]. The appropriateness of these agreements, commonly called "Mary Carter" agreements [*See id.* at 226 (derived from the landmark case of Booth v. Mary Carter Paint, Co., 202 So. 2d 8 (Fla. App. 1967)], has recently come under attack [Comment, *The Mary Carter Agreement: Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1393 (1974)]. In an apparent response to such concern, the legislature has enacted Chapter 568 in an attempt to prevent the abuse of such agreements in tort liability cases involving multiple tortfeasors.

The advantages to a plaintiff of a settlement with some, but not all, defendants are several: (1) there is no release of the other codefendants unless the settlement expressly provides for such release; (2) there is no reduction in the potential liability of any nonagreeing defendant; and (3) the settlement removes the preexisting adversary relationship between the plaintiff and the settling defendant [Thornton & Wick, *Loan Recept Agreements: Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, INS. COUNSEL J. 226, 227-28 (April 1976)]. There are also advantages for one of several codefendants to settle, as the settlement fixes his or her maximum liability and, depending upon the terms of the agreement and the outcome of the case, the settling defendant may be obligated for less than the amount agreed to with the plaintiff [*See id.* at 228].

Once one defendant settles, however, the remaining defendant(s) may face several problems: (1) the agreement almost always names the nonsettling defendant(s) as wholly liable, making disclosure of the complete agreement a hazardous move; (2) the agreement with one defendant diminishes the chances that another defendant can settle with the plaintiff; and (3) a settling defendant often will remain in the case, resulting in a "sham" case by the settling defendant [*Id.* at 234]. The continuing presence of a defendant who has settled, although not the forthright approach, is most often the situation [*Id.* at 232] and may mislead the jury as to how many parties and even which parties shall share any resulting judgment [*See* Comment, *The Mary Carter Agreement: Solving the Problems of Collusive Suits in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1398-403 (1974)]. On the other hand, a "Mary Carter" agreement that provides for a settlement agreement that limits liability of the agreeing defendants to an amount that is dependent upon the sum ultimately recovered by a plaintiff, may be particularly vulnerable to abuse if undisclosed to a jury [*See* Thorton & Wick, *Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, INS. COUNSEL J. 226, 228-30 (April 1976)]. A settlement limits an alleged tortfeasor's liability without regard to the judi-

cial determination of fault [CAL. CIV. PROC. CODE §877], and it would seem logical that a party defendant agreeing to settle would have an incentive to give testimony against codefendants if the amount of his or her settlement is dependent upon the final recovery of the plaintiff. [*See* Thornton & Wick, *Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, INS. COUNSEL J. 226, 228 (April 1976)].

In an apparent response to the problems associated with these sliding scale recovery agreements, the legislature has enacted Chapter 568 to add Section 877.5 to the Code of Civil Procedure. Section 877.5 applies only when there is an agreement between the plaintiff(s) and one or more, but not all, alleged defendant tortfeasors and the agreement is based upon a sliding scale of recovery. [CAL. CIV. PROC. CODE §8775(a)]. Chapter 568 defines these sliding scale recovery agreements as agreements that limit the liability of an agreeing defendant to an amount that is dependent upon the sum recovered by the plaintiff from the nonagreeing parties [CAL. CIV. PROC. CODE §877.5(b)]. Pursuant to Chapter 568, the existence of such an agreement requires the parties entering into the pact to inform the court of its existence and terms [CAL. CIV. PROC. CODE §877.5(a)(1)]. Furthermore, if the action is tried before a jury and a defendant who has agreed to a sliding scale recovery agreement *is called as a witness*, the court must, upon motion of any party, disclose to the jury the existence of the agreement and its contents *unless* the court determines that disclosure will result in undue prejudice or will confuse or mislead the jury [CAL. CIV. PROC. CODE §877.5(a)(2)]. The existence of a sliding scale recovery agreement, however, may be disclosed only to the extent that is necessary to allow the jury to understand the essential nature of the agreement without disclosing any monetary terms or contingencies and to allow the jury to understand that the agreement may bias the testimony of the alleged tortfeasor-witness who entered into the agreement [CAL. CIV. PROC. CODE §877.5(a)(2)].

A "Mary Carter" agreement often results in an unfair surprise to the nonagreeing defendant, and may destroy his or her case if the defense is at all based upon anticipated attempts by codefendants to avoid liability [Comment, *The Mary Carter Agreement: Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1402 (1974)]. Thus, with prejudgment settlements becoming more prominent [*See* King, *Thumbs in the Dike: Procedures to Contain the Flood of Personal Injury Cases*, 39 FORDHAM L. REV. 223, 223 (1970)], the provisions of Chapter 568 that require disclosure of sliding scale recovery agreements when a defendant party to the action is a witness, will apparently provide greater protection to nonagreeing defendants in an action involving joint tortfeasors.

See Generally:
1) Thorton & Wick, *Loan Recept Agreements: Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, INS. COUNSEL J. 226 (April 1976).
2) Comment, *Settlement Devices with Joint Tortfeasors*, 25 FLA. L. REV. 762, 772-78 (1973).

Civil Procedure; attorney fees in public interest litigation

Code of Civil Procedure §1021.5 (new).
AB 1310 (Berman); STATS 1977, Ch 1197
Support: California Rural League Assistance; State Bar of California
Opposition: California Association of Realtors; League of California Cities

Under existing law the measure and mode of compensation of attorneys is left to the agreement between attorney and client unless specifically authorized by statute [CAL. CIV. PROC. CODE §1021]. Consistent with this law, the legislature on several previous occasions has created specific statutory exceptions to the general rule of Section 1021 by allowing attorney fee shifting in areas including workers' compensation [*See* CAL. LAB. CODE §§4651.3, 5410.1] and shareholder derivative actions [*See* CAL. CORP. CODE §800(d)]. Section 1021.5 of the Code of Civil Procedure, as added by Chapter 1197, now empowers California courts, upon motion of the prevailing party, to award reasonable attorneys' fees to this party in an action that serves to enforce a right affecting the public interest. The award is permissible if: (1) a significant benefit is conferred upon the general public or a large class of persons by the prosecution of the action; (2) the award is appropriate in light of the necessity and financial burden of enforcing the right involved; and (3) such fees should not, in the interest of justice, be paid out of any recovery. Chapter 1197 limits recoveries of attorneys' fees in actions involving public entities by denying such an award to a prevailing public entity [CAL. CIV. PROC. CODE §1021.5].

COMMENT

In 1975 the United States Supreme Court issued an opinion in the case of *Alyeska Pipeline Service Co. v. Wilderness Society* [421 U.S. 240 (1975)] that reversed an apparent trend in the federal court system under which attorneys' fees had been awarded to successful plaintiffs who prosecuted public interests suits and were thus said to be acting as "private attorneys general" [*See id.* at 270-71 n.46 (1975). *See generally* Hoitt v. Vitek, 495 F.2d 219, 220-21 (1st Cir. 1974); Cornish v. Richland Parish School Bd., 495 F.2d 189, 191-92 (5th Cir. 1974); Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974)]. In *Alyeska* the Court declared that the "American Rule", recognized in *Arcambel v. Wiseman* [3 U.S. (3 Dall.) 306, 306 (1796)], precluded the allowance of attorneys' fees in federal courts [*See*

Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 247-50 (1975)]. The "American Rule" proscribes the inclusion of attorneys' fees as an element of damages or costs, and has been said to stem from the early American belief that attorneys were not essential to a legal system based on easily manipulable rules [*See* Goodhard, *Costs*, 38 YALE L.J. 849, 873 (1929)]. Recognizing that permissible judicial exceptions had developed in which the court could award fees in limited situations, as when the plaintiff recovers a common fund on behalf of others [Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. at 257] and when the loser either acts in willful disobedience to a court order or in bad faith [*Id.* at 258], the Court held that Congress had preempted the capacity to shift fees in actions based upon statutory law by explicitly directing payment of such fees only when it deemed such action desirable, as in antitrust actions [*Id.* at 261-62]. Finally, the Court cited Section 1920 of Title 28 of the United States Code, which lists permissible taxing of court costs, and Section 1923(a) of Title 28 of the United States Code, which lists docket fees and costs of briefs that may also be taxed as costs, as precluding such awards at law in the absence of express statutory authority [*See id.* at 255-57].

Although state courts do not appear to be expressly bound by the *Alyeska* decision, there has been speculation that, due to the similar developmental structure of California law, *Alyeska* may have a substantial chilling effect upon the development of a state doctrine recognizing the private attorney general concept as a permissible basis for fee shifting in California [*See* Comment, *After Alyeska: Will Public Interest Litigation Survive?*, 16 SANTA CLARA L. REV. 267, 319 (1976)]. The speculation as to the possible "chilling" effect of *Alyeska* rests upon the facts that California also has a preclusionary statute similar to the federal law [*See* CAL. CIV. PROC. CODE §1021], and has judicially allowed fee shifting in specific situations [*See, e.g.*, Williams v. MacDougall, 39 Cal. 80, 85 (1870) (obstinate defendant); Fletcher v. A.J. Industries, 266 Cal. App. 2d 313, 323, 72 Cal. Rptr. 146, 152 (1968) (substantial benefit theory); Hornaday v. Hornaday, 95 Cal. App. 2d 384, 394, 213 P.2d 91, 98 (1949) (common fund)]. Furthermore, the California Supreme Court has neither adopted nor rejected the private attorney general theory [*See* D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 27, 520 P.2d 10, 29, 112 Cal. Rptr. 786, 805 (1974)] and may, therefore, be influenced by the *Alyeska* reasoning. This failure to act has, in at least two cases, caused lower courts to refuse to grant attorney fees on the private attorney general rationale [*See* Mandel v. Hodges, 54 Cal. App. 3d 596, 620, 127 Cal. Rptr. 244, 261 (1976); People *ex. rel.* Department of Public Works v. Basio, 47 Cal. App. 3d 495, 532, 121 Cal. Rptr. 375, 397 (1975)].

By adopting Chapter 1197, the legislature arguably intends to establish

statutorily the concept of fee shifting in public interest litigation in the California courts, rather than risk a state supreme court refusal to create a viable judicial exception in the area. Not only will the enactment of Chapter 1197 place California in the forefront on this issue [*See* Note, *Attorney's Fees—Public Interest Law—Beyond Alyeska: Creating a Workable Private Attorney General Exception*, 51 WASH. L. REV. 1047, 1064-65 (1975-76) (speculating on the future course of various state courts and legislatures)], but, according to express language in *Alyeska*, it will also permit application of the concept by federal courts hearing cases in California based upon diversity jurisdiction [Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n.31 (1975)].

See Generally:

1) 4 B. WITKIN, CALIFORNIA PROCEDURE, §116 (bases of award of attorneys' fees), §§125-128 (statutory fee shifting) (2d ed. 1971).
2) Mathis, *Requesting Court Awarded Attorney's Fees in the Absence of Statutory Authorization*, 49 WIS. B. BULL. 39 (Oct. 1976).
3) Comment, *Court Awarded Attorneys Fees and Equal Access to the Courts*, 122 U. PA. L.R. 636 (1973-74).

Civil Procedure; costs of expert witnesses—settlement offers

Code of Civil Procedure §998 (amended).
SB 172 (Song); STATS 1977, Ch 458
Support: State Bar of California
Opposition: California Dental Association

Section 998 of the Code of Civil Procedure delineates the procedures for making a settlement offer in a civil action and permits a defendant or plaintiff whose offer to settle before trial is not accepted to recover certain costs if the opposing party fails to obtain a judgment more favorable than the settlement offer [*See* CAL. CIV. PROC. CODE §998(c)-(d)]. The purpose of Section 998 and similar provisions such as Rule 68 of the Federal Rules of Civil Procedure is apparently "to induce or influence a party to settle litigation and obviate the necessity of trial" [Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607, 610 (E.D.N.Y. 1974); *see* CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §14.9 (1977)]. Prior to the enactment of Chapter 458, however, if a plaintiff did not accept a settlement offer in any proceeding other than an eminent domain action, or if a defendant did not accept such an offer in any action, then such a party could have been required to pay, in addition to other costs, a reasonable sum to cover only those expert witness costs that were actually incurred and reasonably necessary in the *preparation* of the case for trial [*See* CAL. STATS. 1971, c. 1679, §3, at 3605. *See generally* CAL. CIV. PROC. CODE §1250.410 (settlement offers in eminent domain proceedings)].

Chapter 458 amends Section 998 to now permit the recovery of costs

incurred for the services of expert witnesses *during trial*, as well as those costs incurred for such services in preparation for trial, provided, as in the past, that these expert witnesses are not in the employ of any party to the action [*Compare* CAL. STATS. 1971, c. 1679, §3, at 3605 *with* CAL. CIV. PROC. CODE §998(c)-(d)]. Chapter 458 also provides that the compensation for expert witnesses that may be paid pursuant to this section is now limited to the costs specified in Section 68092.5 of the Government Code, which delineates the recoverable costs for expert witnesses required to appear in court or at a deposition [CAL. CIV. PROC. CODE §998(g)]. Section 68092.5 indicates that an expert witness is to receive "reasonable compensation for his entire time," including travel time and the time for which he or she is required to remain in the place of trial or deposition pursuant to subpoena [CAL. GOV'T CODE §68092.5(a)], or a sum that was stipulated in an express contract between the witness and a party to the suit [CAL. GOV'T CODE §68092.5(c)]. Thus, by permitting the recovery of expert witness costs that are incurred during both trial preparation and the trial itself from a party who fails to receive a more favorable judgment than the offered settlement, Chapter 458 arguably furthers the purpose of Section 998 by encouraging pretrial settlement of suits.

See Generally:
1) 4 B. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§40-42 (settlement offers) (2d ed. 1971), (Supp. 1971).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §14.9 (settlement offers) (1977).

Civil Procedure; amendment of money judgments

Code of Civil Procedure §85 (amended).
AB 439 (Chel); STATS 1977, Ch 71
Support: Western Center on Law and Poverty

Prior to the enactment of Chapter 71, justice and municipal courts apparently had no express authority to amend the terms and conditions of a previous money judgment to provide for payment in installments [*See* CAL. STATS. 1976, c. 1288, §4, at —]. Consequently, despite the fact that the law apparently permits a court to amend and control its process and orders to make them conform to the law and justice [CAL. CIV. PROC. CODE §128(8)], some courts have been reluctant to amend the terms and conditions of a money judgment in this manner [Memorandum from Western Center on Law and Poverty to Senate Committee on the Judiciary (copy on file at *Pacific Law Journal*)].

Chapter 71 now permits municipal and justice courts to amend the terms and conditions for payment of a judgment at any time to provide for installment payments [CAL. CIV. PROC. CODE §85]. These courts, however,

may only amend the payment terms of a judgment in this manner upon noticed motion of a party who can show "good cause" for such an amendment [CAL. CIV. PROC. CODE §85]. Similar statutes in other jurisdictions require the court to take into consideration the reasonable requirements of the judgment debtor and his or her family when the court is fixing the amount of the installment payment [*See, e.g.*, MICH. COMP. LAWS ANN. §§600.6107, .6201, .6221; N.Y. CIV. PRAC. LAW §§5226, 5240 (McKinney)]. Thus, "good cause" would appear to include at least those situations in which such an amendment is necessary to enable debtors to meet their reasonable requirements and those of their families [*Compare* CAL. CIV. PROC. CODE §85 *with* MICH. COMP. LAWS ANN. §§600.6107, .6201, .6221 *and* N.Y. CIV. PRAC. LAW §§5226, 5240 (McKinney)]. Furthermore, if good cause is shown, Section 85 permits the amending of a judgment to provide for installment payments without regard to the nature of the underlying debt or whether the moving party appeared before entry of such judgment or order.

See Generally:
1) 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 212 (payment of judgments) (1975).

Civil Procedure; enforcement of sister state money-judgments—interest and costs

Code of Civil Procedure §§1710.15, 1710.25, 1710.30, 1710.40 (amended).
AB 85 (McAlister); STATS 1977, Ch 232
Support: California Law Revision Commission

California law provides an expeditious registration procedure for enforcing sister state money judgments in California [*See* CAL. CIV. PROC. CODE §§1710.10-.65; *Recommendation Relating to Sister State Money Judgments*, 13 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES 1671, 1673 (1976)]. This procedure offers a judgment creditor the opportunity to obtain a California judgment by registering his or her sister state judgment with the specified superior court, and thus avoiding the necessity of bringing a completely independent action [*See* CAL. CIV. PROC. CODE §1710.60(a); 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 207, 210 (1975)]. This registration process, however, did not include the interest on a sister state judgment or the costs of completing the judgment registration procedure as part of the California judgment [*See Recommendation Relating to Sister State Money Judgments*, 13 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES 1671, 1673-74 (1976)]. As a result, if a judgment creditor wished to obtain the accrued

interest on a sister state judgment under the prior law, a court hearing was apparently required to determine the applicable rate, except when the rate was stated in the sister state judgment [*See id.* at 1673]. At these hearings, there was no ceiling placed on the rate used to compute accrued interest; rather, the court in *all* cases simply employed the interest rate of the state in which the initial judgment had been rendered [*See* Knight v. Barnes, 182 F. Supp. 383, 384 (S.D. Cal. 1960); Parnham v. Parnham, 32 Cal. App. 2d 93, 98, 89 P.2d 189, 192 (1939); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §101 (1971)]. The original California sister state judgment registration procedure failed to include recovery of accrued interest and costs apparently because it was modeled after the 1964 version of the Uniform Enforcement of Foreign Judgments Act of 1948 [*See* UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT §§1-10 (1964 version); Feldman, *Sister State and Foreign Money-Judgments Act of 1974*, 50 CAL. ST. B.J. 483, 483 (1975)], which deleted these provisions from the original version [*Compare* UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT §14 (1948 version) *with* UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT §§1-10 (1964 version)].

Chapter 232 now permits a judgment creditor to obtain the interest accrued on a sister state money judgment by including in the registration application, *inter alia*, a statement of the rate of interest applicable to the judgment under the law of the sister state, a citation to the law of the sister state establishing such a rate, and the amount of interest accrued on the sister state judgment [CAL. CIV. PROC. CODE §§1710.15(b)(3)]. The amount of this accrued interest is still computed using the sister state's rate of interest, but now only to the extent that this rate does not exceed seven percent per annum [*See* CAL. CIV. PROC. CODE §§1710.15(b)(3), .25(a)(2)], which is the rate of interest applicable to judgments rendered in California [*See* CAL. CONST. art. XV, §1]. After the entry of a California judgment, the amount of interest accrued is computed at the rate seven percent per annum [CAL. CIV. PROC. CODE §1710.25(b)].

In addition, Section 1710.40, as amended by Chapter 232, now provides that when the amount of interest accrued on a sister state judgment entered in California is incorrectly stated, a judgment debtor may move to vacate the California judgment [CAL. CIV. PROC. CODE §1710.40(a), (b)]. After a hearing on such a motion, a court may either vacate, modify, or affirm the judgment as entered, and must, if requested by one of the parties, file its findings on the motion in writing, unless the amount of the sister state judgment entered is $1,000 or less [*See* CAL. CIV. PROC. CODE §1710.40(c)].

In addition to the amount of interest accrued on a sister state judgment, a judgment creditor may now recover the fee paid to file the application for

entry of such judgment [CAL. CIV. PROC. CODE §1710.25(a)(3)] and the fee charged for serving notice of entry of the sister state judgment in California, provided this service fee does not exceed the amount allowed to public officers or employees in this state for such service [CAL. CIV. PROC. CODE §1710.30(b)]. The filing fee may be recovered by simply including the amount of this fee in the judgment registration application [*See* CAL. CIV. PROC. CODE §1710.25(a)(3)]. To recover the fee for service of the notice of entry of judgment, however, a judgment creditor must follow the fee recovery procedures established by Section 1033.7 of the Code of Civil Procedure [CAL. CIV. PROC. CODE §1710.30(b)]. This procedure requires that a judgment creditor file a verified memorandum of the service fee and serve a copy of this memorandum on the judgment debtor not more than six months after the fee has been paid [CAL. CIV. PROC. CODE §1033.7]. If the debtor fails to challenge the memorandum within ten days of receipt of the copy or the court finds such a challenge to be invalid, the clerk of the court must enter the amount of the fee in the margin of the judgment and this amount must thereafter be included in any writ of execution issued upon that judgment [CAL. CIV. PROC. CODE §1033.7]. In summary, Chapter 232 codifies the right of judgment creditors to recover accrued interest and costs by incorporating the necessary recovery procedures into California's expeditious sister state judgment registration process, and facilitates the prompt and equitable treatment of all sister state money judgments sought to be entered in this state.

See Generally:

1) 5 B. WITKIN, CALIFORNIA PROCEDURE *Enforcement of Judgement* §§195A-E (enforcement of sister state money judgments) (Supp. 1977).
2) 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 207 (enforcement of sister state money judgments) (1975).
3) *Recommendation Relating to Enforcement of Sister State Money Judgments*, 11 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES 451 (1973).

Civil Procedure; levy and execution

Code of Civil Procedure §§682a, 683 (amended).
AB 308 (McVittie); STATS 1977, Ch 42
Support: State Bar of California

Prior to the enactment of Chapter 42, a judgment creditor was required to post a bond in an amount not less than twice the amount of the judgment in order to levy an execution upon specified personal property [CAL. STATS. 1974, c. 1516, §13, at 3377]. Section 682a, as amended by Chapter 42, now permits the posting of a smaller bond when the amount sought to be reached by such a levy is *less* than the amount of the judgment [*See* STATE BAR OF CALIFORNIA, 1974 CONFERENCE RESOLUTION 11-22]. Under these circumstances a bond equal to "twice the amount sought to be reached by the

levy" is all that is now required to levy upon a safe deposit box, a bank or savings and loan account, a savings and loan share, or an investment certificate, none of which are solely in the name of the judgment debtor [CAL. CIV. PROC. CODE §682a]. Chapter 42 was apparently enacted in response to the many instances in which judgment creditors wished to levy on a bank account or on items in a safety deposit box that were of relatively little value when compared with the amount of the judgment, but were deterred from doing so because of the expense of obtaining a bond that was twice the amount of the judgment [STATE BAR OF CALIFORNIA, 1974 CONFERENCE RESOLUTION 11-22].

Prior to enactment of Chapter 42, the law apparently permitted an alias return, i.e., the redelivery of a writ of execution to permit the receipt of proceeds acquired after the return of the writ, only when a sale under a writ of execution was not completed before the return of the writ [CAL. STATS. 1974, c. 1251, §2, at 2705]. When a levying officer, however, received proceeds from a levy of execution after he or she had returned the writ of execution unsatisfied, a new writ had to be issued before the officer could levy such proceeds and return them to the court [*See* CAL. STATS. 1974, c. 1251, §2, at 2705; Partch v. Adams, 55 Cal. App. 2d 1, 11, 130 P.2d 244, 250 (1942)]. This procedure involved additional court costs and administrative measures to issue these new writs, plus an additional fee for the new writ, which was charged to the judgment creditor [STATE BAR OF CALIFORNIA, 1974 CONFERENCE RESOLUTION 11-19]. With respect to the requirement that a new writ be obtained after the original writ was returned unsatisfied, the prior law was arguably vague since it provided that the levying officer may make "an alias return of the proceedings of a sale *or levy*" [CAL. CIV. PROC. CODE §683 (emphasis added); CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §17.34 (alias and pluries writs) (1968)]. Chapter 42 has apparently been adopted to clarify this ambiguity and to alleviate the waste that is involved in issuing a new writ [*See* STATE BAR OF CALIFORNIA, 1974 CONFERENCE RESOLUTION 11-19]. The law now permits the clerk to redeliver the original writ so that a levying officer may make an alias return of after-acquired proceeds without the necessity of issuing a new writ [CAL. CIV. PROC. CODE §683]. Thus, Chapter 42 would appear to reduce the cost of levying upon bank accounts or the contents of safe deposit boxes and to facilitate delivery of the proceeds from a writ of execution when such proceeds are acquired by a levying officer after the return of the writ.

See Generally:
1) 5 B. WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §72 (time of levy and return) (2d ed. 1971).

Civil Procedure; levy of execution—keepers

Code of Civil Procedure §688 (amended).
AB 1007 (McAlister); STATS 1977, Ch 155
(*Effective June 29, 1977*)
Support: California Law Revision Commission

Prior to enactment of Chapter 155 and the new Attachment Law [*See* CAL. CIV. PROC. CODE §§481.010-493.060], Section 688 of the Code of Civil Procedure provided that tangible personal property in the hands of the judgment debtor was to be levied upon in the same manner that such property was attached [CAL. STATS. 1970, c. 1523, §6.5, at 3069]. As a result, the levying officer was required to levy upon personal property used as a dwelling, such as a housetrailer, mobilehome, or boat by placing a keeper in charge of the property for at least two days [*See* CAL. STATS. 1970, c. 1523, §§ 4, 6.5, at 3064, 3069]. Furthermore, whenever a levy was made on personal property (other than money, or a vehicle required to be registered under the Vehicle Code, belonging to a going concern) the levying officer was similarly required to place a keeper in charge of the property for at least two days, if the judgment debtor consented [*See* CAL. STATS. 1970, c. 1523, §§4, 6.5 at 3064, 3069]. During that period, the judgment debtor was permitted to operate his or her business with the proceeds from all sales going to the keeper for the purpose of satisfying the levy [*See* CAL. STATS. 1970, c. 1523, §§4, 6.5, at 3064, 3069].

When the new Attachment Law became operative on January 1, 1977, Section 688 was revised to require that tangible property in the possession of the judgment debtor be levied upon in the manner provided by Section 488.320 of the Code of Civil Procedure [CAL. STATS. 1976, c. 437, §46, at —]. Section 488.320 directs the levying officer to attach tangible personal property by taking it into custody, except as otherwise provided by Article 2 (commencing with Section 488.310 (1) of the Code of Civil Procedure. Section 488.045 of the Code of Civil Procedure specifies the manner for taking such property into custody by stating that "where a levying officer is directed to take property into custody, he may do so either by removing the property to a place of safekeeping or by installing a keeper," apparently at the levying officer's discretion. A third section of the Attachment Law, which is an exception to the procedure set out in Section 488.320, permits a levying officer to place, for a period not to exceed ten days, a keeper in charge of the inventory of a going concern or of farm products pursuant to a writ of attachment, but this section is not incorporated by direct reference in Section 688 [*See* CAL. CIV. PROC. CODE §§488.320, .360]. Thus, narrowly construed, neither Section 488.045 nor Section 488.320 expressly requires that the levying officer place a keeper in charge of the property

[*Recommendation Relating to Use of Keepers Pursuant to Writs of Execution*, 14 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES —, — (1978)]. Liberally construed, however, the law could have been interpreted to permit the use of a keeper for a period not to exceed ten days when levying upon the inventory of a going concern or upon farm products [*Id.* at —; *see* CAL. CIV. PROC. CODE §488.360].

To resolve these interpretive problems and to achieve some uniformity in the use of keepers in the levy process, Section 688 has been amended by Chapter 155 and now contains no reference to Section 488.320 [*See* CAL. CIV. PROC. CODE §688(b), (c)]. Instead, Section 688(c) now specifies the manner in which tangible personal property in the possession of a judgment debtor is to be levied upon. When directed to do so, a levying officer may now take such property into custody by removing the property to a place of safekeeping or by installing a keeper at the officer's discretion [*See* CAL. CIV. PROC. CODE §688(c)]. In the case of personal property used as a dwelling, however, levying officers are once again *required* to levy upon such property by placing a keeper in charge of the property at the judgment creditor's expense while permitting the judgment debtor to remain in possession for at least two days [CAL. CIV. PROC. CODE §688(c)]. Similarly, the law provides that if a judgment debtor consents, a levying officer must levy upon personal property of a going business (other than money or a vehicle required to be registered under the vehicle code) by placing a keeper in charge of the property at the judgment creditor's expense for at least two days [CAL. CIV. PROC. CODE §688(c)]. During that period the judgment debtor is permitted to continue to operate the business at his or her expense, with the proceeds from all sales going to the keeper for the purpose of satisfying the levy, unless otherwise authorized by the judgment creditor [*See* CAL. CIV. PROC. CODE §688(c)].

The elimination of the use of keepers, which resulted from a narrow interpretation of the levy procedures prior to enactment of Chapter 155, apparently deprived judgment debtors of a grace period during which an arrangement preferable to the levy procedure might have been agreed upon by the parties [*Recommendation Relating to Use of Keepers Pursuant to Writs of Execution* 14 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES —, — (1978)]. A broad interpretation of this prior law, which permitted a levy by the use of a keeper for a lengthy period of time, was also undesirable because of the considerable expense involved [*Id.* at —]. Thus, Chapter 155 appears to avoid these undesirable results by providing for a limited grace period during which keepers are placed in charge of certain personal property while judgment debtors are allowed to remain in possession of that property and, if the levy is upon personal

property of a going business, are permitted to continue to operate the business.

See Generally:
1) 2 B. WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §§163, 172, 173 (levy keepers) (2d ed. 1970); §§345A, 361A (levy keepers) (Supp. 1977).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §§9.55-.60 (levy keepers) (1968).

Civil Procedure; execution on dwelling houses

Code of Civil Procedure §§683, 690, 690.31, 690.50, 690.51, 690.52 (amended); Financial Code §864 (amended).
AB 423 (Kapiloff); STATS 1977, Ch 305
(*Effective July 8, 1977*)
Support: Western Center on Law and Poverty

Chapter 305 enacts a variety of changes in the law relating to execution on dwelling houses. Dwelling houses in which debtors and their families actually reside are exempt from execution in the same amount as a homestead claim, which is currently limited to $30,000 [*See* CAL. CIV. CODE §1260; CAL. CIV. PROC. CODE §690.31(a)], except when: (1) the debtor has an existing declared homestead; (2) an encumbrance is given the force and effect of a judgment lien; or (3) the execution or forced sale sought is in satisfaction of judgments obtained on debts secured by mechanics' liens and encumbrances [*See* CAL. CIV. PROC. CODE §690.31(b)]. Prior to the enactment of Chapter 305, the law provided that when an action seeking a writ of execution on a dwelling house was pending in a municipal or justice court, if the judgment creditor alleged that the current value of the dwelling house in question, less any liens and encumbrances on the property, exceeded the allowable exemption and did not allege the applicability of one of the aforementioned exceptions, the court was required to transfer further proceedings to the superior court [*See* CAL. STATS. 1976, c. 1000, §4, at —]. In addition, if the municipal or justice court determined that a writ of execution may only issue if the current value, less any liens and encumbrances, exceeded the allowable exemption, then the court was again required to transfer further proceedings to the superior court [*See* CAL. STATS. 1976, c. 1000, §4, at —]. The law now empowers *the court to which the judgment creditor applied* for the writ of execution to determine whether the current value of the dwelling house, less any liens and encumbrances, exceeds the amount of the allowable exemption [*See* CAL. CIV. PROC. CODE §690.31(c)]. Furthermore, Chapter 305 now requires that when a judgment creditor is seeking a writ of execution on a dwelling house based upon a judgment rendered in another county, he or she must pay a filing fee of four dollars ($4) when filing in a justice court or six dollars ($6) when filing in a

superior or municipal court [CAL. CIV. PROC. CODE §690.31(c)].

Formerly, the notices required in connection with execution on dwelling houses were served in the manner prescribed for giving notice of the sale of real property under a writ of execution in Section 692 of the Code of Civil Procedure [*See* CAL. STATS. 1976, c. 1000, §4, at —]. Consequently, service of such notices apparently had to be made by *all* of the following methods: (1) by posting a notice particularly describing the property in one public place in the city or judicial district where the property was to be executed upon; (2) by publishing the notice in a newspaper of general circulation in the city, judicial district, or county where the property was to be executed upon; *and* (3) by mailing the notice by certified mail to the judgment debtor at his or her business or last known home address or by delivering such notice to the judgment debtor [*See* CAL. CIV. PROC. CODE §692; CAL. STATS. 1976, c. 1000, §4, at —]. Service was arguably required to be made at least 20 days prior to the hearing held to determine if cause to issue a writ of execution is lacking [*See* CAL. CIV. PROC. CODE §692; CAL. STATS. 1976, c. 1000, §4, at —]. Chapter 305 now provides that notice of a hearing concerning the issuance of a writ of execution on a dwelling house or notice of the issuance of the writ itself if the judgment debtor or his or her representative did not appear at the hearing, must be mailed by first-class mail by the levying officer to the judgment debtor and any third party in whose name the property stands according to the county tax assessor's records [*See* CAL. CIV. PROC. CODE §§690.31(d), .31(g), .31(*l*)]. This notice and copies of the prescribed documents must be mailed to the designated parties no less than ten days prior to the date of the hearing or the sale of the property as appropriate [CAL. CIV. PROC. CODE §690.31(*l*)]. In addition, the levying officer is required to personally serve copies of such notices on the occupant of a dwelling or any person of suitable age and discretion found upon the property who is either an employee, an agent, or a member of the family or household of the occupant [CAL. CIV. PROC. CODE §690.31(*l*)]. If no occupant is present at the time of service, the levying officer must post a copy of the notice in a conspicuous place on the premises [CAL. CIV. PROC. CODE §690.31(*l*)]. Furthermore, the hearing and writ of execution notices that are mailed to judgment debtors must now include the statement that *"If you are a tenant and do not claim to be the owner or buyer of this property, this notice does not affect you, please give it to your landlord"* [*Compare* CAL. CIV. PROC. CODE §§690.31(d), .31(g) *with* CAL. STATS. 1976, c. 1000, §4, at —]. These provisions will apparently insure that judgment debtors receive the prescribed notice of the hearing and execution and avoid the unnecessary legal expenses that an unwitting tenant or third party might incur as a result of the belief that they had a right to object to such actions.

Chapter 305 also amends the procedure for claiming exemptions from

execution on a dwelling house by bringing the deadlines for claiming such exemptions into conformity with the deadlines prescribed for claiming exemptions from execution on all other property [*Compare* CAL. STATS. 1976, c. 437, §47, at — *with* CAL. CIV. PROC. CODE §§690.235, 690.50]. Therefore, even when execution is made on a dwelling house, a debtor must deliver an affidavit claiming an exemption from execution to the levying officer within *ten days* after such property has been levied upon [CAL. CIV. PROC. CODE §690.50(a)]. Similarly, a creditor desiring to contest an exemption on a dwelling house or any other property must now file a counteraffidavit within five days of receiving a copy of the exemption [CAL. CIV. PROC. CODE §§690.50(b), .50(c)]. The various changes made by Chapter 305 in the procedure for executing on and exempting dwelling houses reduce administrative waste involved in transferring cases from one court to another, provide better notice to the affected parties, and prescribe a uniform procedure for claiming an exemption to execution on all property.

See Generally:
1) 5 B. WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §49C (dwelling house exemption) (Supp. 1977).
2) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 226 (dwelling house exemption) (1977).

Civil Procedure; lien termination

Code of Civil Procedure Chapter 13 (commencing with §493.010) (new).
SB 221 (Zenovich); STATS 1977, Ch 499
Support: California Law Revision Commission, Credit Managers Association of Southern California

Prior to the enactment of Chapter 499 and the new Attachment Law [CAL. CIV. PROC. CODE §§481.010-492.090], former Section 542b of the Code of Civil Procedure provided that the lien of a temporary restraining order obtained in connection with a prejudgment attachment automatically terminated upon either a defendant's filing of a petition in bankruptcy or making of a general assignment for the benefit of creditors [*See* CAL. STATS. 1972, c. 550, §§9, 19, at 944-45, 950]. When the new Attachment Law was enacted, it replaced the temporary restraining order with a temporary protective order [6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 198 (1975)], but did not continue these automatic lien termination provisions [*Recommendation Relating to the Attachment Law—Effect of Bankruptcy Proceedings; Effect of General Assignments for the Benefit of Creditors*, 14 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES —, — (1978) (hereinafter cited as RECOMMENDATIONS)]. Thus, prior to the enactment of Chapter 499, a trustee in bankruptcy had to initiate proceedings to void an attachment lien under the Federal Bankruptcy

Act [11 U.S.C. §§1-1103 (1970)] [RECOMMENDATIONS at —], which provides that every lien against the property of a debtor obtained by any legal or equitable process within four months before the filing of a petition in bankruptcy will be deemed void if the debtor was insolvent at the time the lien was obtained or the lien was fraudulently sought or granted [11 U.S.C. §107(a)(1) (1970)]. By contrast, after the Attachment Law became operative on January 1, 1977, creditors to whose benefit a general assignment inured were left with no means to effect the termination of such a lien [*See* RECOMMENDATIONS at —], and thus, could only reach property subject to an attachment lien if they could proceed in bankruptcy [*See* 11 U.S.C. §95(b) (1970); RECOMMENDATIONS at —].

Chapter 499 now provides that the filing of a petition initiating bankruptcy proceedings terminates not only a lien created by a temporary protective order, but also a lien created by a prejudgment attachment, if the lien was created by either process within four months prior to the filing of the petition and the bankruptcy court has not ordered the lien preserved for the benefit of the bankrupt [*See* CAL. CIV. PROC. CODE §493.030(b)]. Although similar to the provision of the Federal Bankruptcy Act that permits such liens to be declared void, Chapter 499 does not require a showing that the debtor was insolvent at the time the lien was obtained [*Compare* 11 U.S.C. §107(a)(1) (1970) *with* CAL. CIV. PROC. CODE §493.030(b)]. This requirement was apparently omitted because in many instances it is most difficult to prove insolvency on a given date prior to bankruptcy [*See* Inland Security Co., Inc. v. Estate of Kishner, 382 F. Supp. 338, 345 (W.D. Mo. 1974)].

In addition, Chapter 499 provides that a general assignment for the benefit of creditors terminates both a lien created by a temporary protective order and a lien created by a prejudgment attachment, if the lien was created by either process within four months prior to the making of the general assignment [*See* CAL. CIV. PROC. CODE §493.030(a)]. An assignment for the benefit of creditors is a transfer of a debtor's assets to a third party assignee who acts as trustee for the assigned property and immediately converts such property and distributes the proceeds ratably among the creditors [Jarvis v. Webber, 196 Cal. 86, 98, 236 P. 138, 143 (1925); CONTINUING EDUCATION OF THE BAR, PERSONAL BANKRUPTCY AND WAGE EARNER PLANS §1.7 (1971). *See generally* CAL. CIV. CODE §§3448-3473 (assignments for the benefit of creditors)]. In addition, as used in Chapter 499, a "general assignment for the benefit of creditors" is: (1) an assignment of all of a defendant's assets that are transferrable and not exempt from execution; (2) an assignment for the benefit of all of a defendant's creditors; and (3) an assignment that does not itself create a preference of one creditor or class of creditors over any other creditor or class of creditors [CAL. CIV. PROC. CODE §493.010]. Furthermore, Chapter 499 provides that the assig-

nee of a "general assignment for the benefit of creditors" is now subrogated to the rights of the plaintiff under the temporary protective order or attachment [CAL. CIV. PROC. CODE §493.060]. The Law Revision Commission indicates that this provision is intended to prevent the termination of the lien of the temporary protective order or prejudgment attachment from benefiting a lienholder whose lien was subordinate to the plaintiff's lien but was not terminated by the general assignment [CAL. CIV. PROC. CODE §493.060, CAL. LAW REVISION COMM'N COMMENT]. In the absence of this provision, a secured party whose interest would otherwise be prior to the interest of the assignee of such an assignment would move up in the line of priorities and, as a result, the termination of the attachment would benefit the secured party and not the entire group of the defendant's creditors as was intended [CAL. CIV. PROC. CODE §493.060, CAL. LAW REVISION COMM'N COMMENT]. The effect of this provision is analogous to that of the Bankruptcy Act, which provides that any property affected by a lien deemed void will pass to the trustee in bankruptcy or the debtor [CAL. CIV. PROC. CODE §493.060, CAL. LAW REVISION COMM'N COMMENT. *See generally* 11 U.S.C. §107(a)(3) (1970)]. Chapter 499, however, indicates that there is to be no termination of any attachment lien in California unless all attachment liens on the defendant's property located in other states that were created within four months prior to the making of a general assignment or the filing of a petition initiating bankruptcy proceedings have also terminated under the laws of the other states [CAL. CIV. PROC. CODE §493.030(c); *see* CAL. CIV. PROC. CODE §493.030, CAL. LAW REVISION COMM'N COMMENTS].

When the lien created by a prejudgment *attachment* is terminated by either the filing of a petition initiating bankruptcy proceedings or a "general assignment for the benefit of creditors," Chapter 499 prescribes the procedure that must be followed in order to secure the release of the attachment [*See* CAL. CIV. PROC. CODE §493.040]. In the case of a bankruptcy, the trustee, receiver, or debtor if there is no trustee or receiver, may secure the release of the attachment by filing a request for the release of the attachment with the levying officer stating the grounds for release and describing the property to be released [CAL. CIV. PROC. CODE §493.040(a)]. This request must be executed under oath and must be accompanied by an additional copy of the request [CAL. CIV. PROC. CODE §493.040(a)], and a certified and an additional copy of the petition in bankruptcy [CAL. CIV. PROC. CODE §493.040(c)]. The assignee under a "general assignment for the benefit of creditors" may secure such a release by filing a request in the same manner [CAL. CIV. PROC. CODE §493.040(a)], and by additionally providing two copies of the general assignment [CAL. CIV. PROC. CODE §493.040(b)].

If the immediate release of a prejudgment attachment is sought, the party making such a request must post an undertaking in the amount of the

plaintiff's claim secured by the attachment in order to compensate the plaintiff for any damages that may result from a release of attachment that is later found to have been improper [CAL. CIV. PROC. CODE §493.040(d)]. If such an undertaking has been given, the levying officer must immediately release the attachment upon receipt of the request [CAL. CIV. PROC. CODE §493.040(f)]. The levying officer must also notify the plaintiff of the release within five days of the receipt of the request for a release [CAL. CIV. PROC. CODE §493.040(e)]. If such an undertaking has not been given, the levying officer must release the attachment ten days after the date on which notice of this proposed release is mailed to the plaintiff [CAL. CIV. PROC. CODE §493.040(e)-(f)]. This notice must contain a copy of the request for release of the attachment and a copy of either the petition in bankruptcy or the general assignment for the benefit of creditors that provided the basis for the release [CAL. CIV. PROC. CODE §§493.040(b), .040(c), .040(e)(l)]. Furthermore, Chapter 499 provides that when the attached property has been taken into custody, it must be released to the person who requested the release of attachment or some other person designated in the request [CAL. CIV. PROC. CODE §493.040(g)]. If, however, the attached property has not been taken into custody, the levying officer must release the attachment by notifying the defendant that the attachment has been released and by recording such a release in the office at which the writ of attachment was originally filed [*See* CAL. CIV. PROC. CODE §§488.560, 493.040(g)].

When the lien of a temporary protective order or of a prejudgment attachment has been terminated under these new provisions, Chapter 499 provides that the lien may be reinstated with its previous effect if: (1) the termination was the result of a general assignment for the benefit of creditors and the assignment is set aside for a reason other than the filing of a bankruptcy proceeding; (2) the termination resulted from the filing of a petition initiating a bankruptcy proceeding and the defendant is not finally adjudged bankrupt and no arrangement is proposed and confirmed; or (3) the termination was the result of filing a petition initiating bankruptcy proceedings and the trustee abandons the property that had been subject to the lien [CAL. CIV. PROC. CODE §493.050(a)]. Section 493.050 further provides for the tolling of the running of the effective periods of temporary protective orders and liens of attachment when a defendant terminates the liens on these protective orders or attachments by making a general assignment for the benefit of creditors [CAL. CIV. PROC. CODE §493.050(b); *cf.* Booloodian v. Ohanesian, 13 Cal. App. 3d 635, 639-40, 91 Cal. Rptr. 923, 926 (1970) (tolling of the period of attachment lien under former Section 542b)]. The Federal Law provides for the tolling of similar state statutes of limitation upon the filing of a petition in bankruptcy [*See* 11 U.S.C. §29(f) (1970)]. In addition, Chapter 499 insulates the levying officer from liability

for releasing an attachment in accordance with its provisions and also creates immunity for all others acting in conformity with such a release [CAL. CIV. PROC. CODE §493.040(h)]. Thus, the Law Revision Commission has indicated that by enacting the procedures set forth in Chapter 499 that permit the automatic termination of the liens of temporary protective orders and attachments under specified conditions, the legislature has furthered the state policy "favoring procedures generally designed to distribute [a] . . . debtor's assets ratably and also eliminates the need for proceedings in bankruptcy to obtain an order declaring such liens void [RECOMMENDATIONS at —].

See Generally:

1) 2 B. WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §187 (effect of bankruptcy on liens) (2d ed. 1970).
2) 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §729 (assignment for benefit of creditors) (1973).
3) Comment, *Assignments for the Benefit of Creditors in California: A Proposed Revision of Ineffectual Statutory Provisions*, 6 U.C.L.A. L. REV. 573 (1959).

Civil Procedure; state tax liens

Fish and Game Code §§8048, 8049, 8050, 8051 (repealed); §8048 (new); Government Code §§7220, 7221, 7222, 7223, 7224, 7225, 7226, 7227, 27282 (amended); Public Resources Code §3772 (repealed); §§3772, 3772.2, 3772.4, 3772.6, 3772.8 (new); §§3744, 3768 (amended); Revenue and Taxation Code §§6757, 6757.5 7871, 7872, 8996, 16061, 16062, 16063, 16064, 18881, 18882, 18882.5, 18883, 26161, 26161.5, 30322, 32386 (repealed); §§6757, 7872, 8996, 16063, 16063.5, 18881, 26161, 30322, 32363, 32386 (new); §§6711, 6738, 6756, 6776, 7851, 7881, 8952, 8991, 8992, 8993, 8994, 9001, 16065, 16071, 16121, 18831, 18863, 18884.5, 18886, 18933, 26162.5, 26251, 26312, 30301, 30311, 30321, 30341, 32365, 32381 (amended); Unemployment Insurance Code §§1703, 1703.5 (repealed); §1703 (new); §§1702, 1704.5, 1755, 1785, 1815, 1816, 1852 (amended).
AB 1467 (Suitt); STATS 1977, Ch 481
(Effective July 1, 1978)
Support: Board of Equalization; California Attorney General; California Bankers Association; California Land Title Association; Controller's Office; Department of Benefit Payments; Franchise Tax Board; Interagency Task Force on the Revision of State Tax Lien Law.

Prior to the enactment of Chapter 481, although many governmental agencies had the authority to acquire and record state tax liens on the real or personal property of a debtor, the procedures for creating and recording such

liens were varied. Chapter 481 establishes a uniform system for the creation, recordation and determination of the priority of state tax liens [*See* CAL. REV. & TAX. CODE §32363 (alcoholic beverage tax liens). *Compare* CAL. FISH & GAME CODE §8048 *with* CAL. STATS. 1957, c. 456, §8049, at 1434 (commercial fishing packing and processing license and tax liens). *Compare* CAL. PUB. RES. CODE §3772 *with* CAL. STATS. 1967, c. 1398, §37, at 3277 (geothermal resource charge liens). *Compare* CAL. REV. & TAX CODE §6757 *with* CAL. STATS. 1965, c. 863, §2, at 2464 (sales and use tax liens). *Compare* CAL. REV. & TAX. CODE §7872 *with* CAL. STATS. 1965, c. 690, §1, at 2070 (motor vehicle fuel license tax liens). *Compare* CAL. REV. & TAX CODE §8996 *with* CAL. STATS. 1965, c. 690, §2, at 2071 (use and fuel tax liens). *Compare* CAL. REV. & TAX. CODE §16063 *with* CAL. STATS. 1943, c. 658, §1, at 2347 (gift tax liens). *Compare* CAL. REV. & TAX CODE §18881 *with* CAL. STATS. 1971, c. 1307, §10, at 2597 (personal income tax liens). *Compare* CAL. REV. & TAX. CODE §26161 *with* CAL. STATS. 1971, c. 1307, §12, at 2597 (bank and corporate tax liens). *Compare* CAL. REV. & TAX. CODE §30322 *with* CAL. STATS. 1965, c. 690, §4, at 2071 (cigarette tax liens). *Compare* CAL. UNEMP. INS. CODE §1703 *with* CAL. STATS. 1974, c. 827, §2, at 1786 (unemployment compensation and disability payment liens)]. Moreover, Chapter 481, which will become operative July 1, 1978 [CAL. STATS. 1977, c. 481, §79, at —], provides that any lien and any rights or causes of action under a state lien recorded in any county pursuant to the prior law will continue in full force and effect for a period of ten years from the last date of recordation or extension [*See* CAL. FISH & GAME CODE §8048(g); CAL. PUB. RES. CODE §3772(g); CAL. REV. & TAX. CODE §§6757(g), 7872(g), 8996(g), 16063(g), 18881(g), 26161(g), 30322(g), 32363(g); CAL. UNEMP. INS. CODE §1703 (g)]. In addition, a lien recorded under the prior law may be extended during this ten year period and a lien so extended will have the same effect as a lien filed under the new procedure except that its priority will be determined pursuant to the prior law [*See* CAL. FISH & GAME CODE §8048(g); CAL. PUB. RES. CODE §3772(g); CAL. REV. & TAX. CODE §§6757(g), 7872(g), 8996(g), 16063(g), 18881(g), 26261(g), 30322(g), 32363(g); CAL. UNEMP. INS. CODE §1703(g)].

Under the procedure prescribed by Chapter 481, a state tax lien in the amount of the tax plus penalties, costs, and interest is perfected and enforceable at the time the tax becomes "due and payable" [CAL. FISH & GAME CODE §8048(a); CAL. PUB. RES. CODE §3772(a); CAL. REV. & TAX. CODE §§6757(a), 7872(a), 8996(a), 16063(a), 18881(a), 26161(a), 30322(a), 32363(a); CAL. UNEMP. INS. CODE §1703(a)]. For purposes of this procedure, a tax becomes "due and payable" on the date a return is required to be filed if a taxpayer fails to pay the amount due or on the date a determination

or assessment of the particular tax is made [*See* CAL. FISH & GAME CODE §8048(a); CAL. PUB. RES. CODE §3772(a); CAL. REV. & TAX. CODE §§6757(a), 7872(a), 8996(a), 16063(a), 18881(a), 26161(a), 30322(a), 32363(a); CAL. UNEMP. INS. CODE §1703(a)]. A state tax lien is enforceable upon all property and rights to property whether real or personal, tangible or intangible, including all after-acquired property and rights to property, belonging to the taxpayer and located in the state [CAL. FISH & GAME CODE §8048(a); CAL. PUB. RES. CODE §3772(a); CAL. REV. & TAX. CODE §§6757(a), 7872(a), 8996(a), 16063(a), 18881(a), 26161(a), 30322(a), 32363(a); CAL. UNEMP. INS. CODE §1703(a)].

Chapter 481 specifically provides that a state tax lien extends to any action or special proceeding in which a taxpayer may become entitled to property or a money judgment and any judgment that the taxpayer subsequently procures, notwithstanding other statutory limitations applicable to liens and execution on actions and judgments [*See* CAL. CIV. PROC. CODE §§688, 688.1; CAL. FISH & GAME CODE §8048(f); CAL. PUB. RES. CODE §3772(f); CAL. REV. & TAX. CODE §§6757(f), 7872(f), 8996(f), 16063(f), 18881(f), 26161(f), 30322(f), 32363(f); CAL. UNEMP. INS. CODE §1703(f)]. Notice of a tax lien relevant to such an action must be given to all parties who have made an appearance in the action and to judgment creditors who have been granted a lien or an order permitting intervention, and no compromise, settlement, dismissal, or satisfaction may be entered into by the taxpayer with any other party, lienor, or intervenor in the action without the consent of the taxing agency unless the lien has been satisfied or discharged [CAL. FISH & GAME CODE §8048(f); CAL. PUB. RES. CODE §3772(f); CAL. REV. & TAX. CODE §§6757(f), 7872(f), 8996(f), 16063(f), 18881(f), 26161(f), 30322(f), 32363(f); CAL. UNEMP. INS. CODE §1703(f)]. In addition, the priority of a state tax lien on a cause of action or judgment is now determined from the time of filing of the notice in the action [CAL. FISH & GAME CODE §8048(f); CAL. PUB. RES. CODE §3772(f); CAL. REV. & TAX. CODE §§6757(f), 7872(f), 8996(f), 16063(f), 18881(f), 26161(f), 30322(f), 32363(f); CAL. UNEMP. INS. CODE §1703(f)].

The initial duration of a state tax lien cannot exceed ten years from the time the tax became due and payable, unless the lien is recorded or filed, in which case it will continue for ten years from the date the notice of the lien was recorded or filed [*See* CAL. FISH & GAME CODE §8048(a)-(e); CAL. PUB. RES. CODE §3772(a)-(e); CAL. REV. & TAX. CODE §§6757(a)-(e), 7872(a)-(e), 8996(a)-(e), 16063(a)-(e), 18881(a)-(e), 26161(a)-(e), 30322 (a)-(e), 32363(a)-(e); CAL. UNEMP. INS. CODE §1703(a)-(e)]. These tax liens, however, may be extended for an additional ten years by recording or filing a new notice within ten years from the date of the recording or filing of

the prior notice or from the date of the last extension of the lien [*See* CAL. FISH & GAME CODE §8048(e); CAL. PUB. RES. CODE §3772(e); CAL. REV. & TAX. CODE §§6757(e), 7872(e), 8996(e), 16063(e), 18881(e), 26161(e), 30322(e), 32363(e); CAL. UNEMP. INS. CODE §1703(e)]. A state tax lien on real property may be recorded in the office of the county recorder of the county in which the property is located and a state tax lien on personal property may be filed with the Secretary of State, but in either case the recorded or filed notice must contain: (1) the name and last known address of the person liable for the tax; (2) the amount of the tax; (3) a statement that the tax will be a lien upon all real or personal property and rights to such property, including all after-acquired property and rights to property belonging to such person; and (4) a statement that the department has complied with all the applicable provisions in the computation and levy of the amount assessed [CAL. FISH & GAME CODE §8048(b)-(d); CAL. PUB. RES. CODE §3772(b)-(d); CAL. REV. & TAX. CODE §§6757(b)-(d), 7872(b)-(d), 8996(b)-(d), 16063(b)-(d), 18881(b)-(d), 26161(b)-(d), 30322(b)-(d), 32363(b)-(d); CAL. UNEMP. INS. CODE §1703(b)-(d)].

Chapter 481 also establishes the relative priority of state tax liens with respect to other security interests. A tax lien on *real property* is only inferior to a right, title, or interest in land acquired or perfected *prior* to the recordation of a notice of a state tax lien by: (1) a successor in interest of the taxpayer without knowledge of the lien; (2) a holder of a security interest; (3) a mechanic's lienor; or (4) a judgment lien creditor [CAL. FISH & GAME CODE §8048(b); CAL. PUB. RES. CODE §3772(b); CAL. REV. & TAX. CODE §§6757(b), 7872(b), 8996(b), 16063(b), 18881(b), 26161(b), 30322(b), 32363(b); CAL. UNEMP. INS. CODE §1703(b)]. Similarly, under the new law a state tax lien on *personal property* is only inferior to: (1) a holder who perfects his or her security interest in the manner specified by the Uniform Commercial Code prior to the time the notice of the tax lien is filed; (2) any person, other than the tax debtor, who without knowledge of the tax lien acquires and perfects his or her interest in the property according to the law prior to the time the notice is filed; (3) a buyer in the ordinary course of business who would take free of a security interest created by his or her seller; or (4) any person, other than the tax debtor, who holds specified negotiable instruments that are given priority over a state tax lien or who holds an interest that has priority over a security interest held by a third party [*See* CAL. FISH & GAME CODE §8048(c); CAL. PUB. RES. CODE §3772(c); CAL. REV. & TAX. CODE §§6757(c), 7872(c), 8996(c), 16063(c), 18881(c), 26161(c), 30322(c), 32363(c); CAL. UNEMP. INS. CODE §1703(c)]. Thus, Chapter 481 establishes a uniform procedure for the creation, recordation, and determination of the priority of state tax liens.

COMMENT

The Internal Revenue Code similarly provides that failure to pay any tax creates a lien from the time an assessment of tax liability is made upon all property and rights to property belonging to the taxpayer [I.R.C. §§6321, 6322 (1970)]. Under the universal principle that "a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds," *i.e.* "the first in time is the first in right" [United States v. New Britain, 347 U.S. 81, 85 (1954); Rankin v. Scott, 25 U.S. (12 Wheat.) 177, 179 (1827)], a federal tax lien would be given priority over a state tax lien that had not been recorded before the federal tax was assessed because under the prior law a state tax lien did not arise until it was recorded [*See* CAL. STATS. 1974, c. 827, §2, at 1786; CAL. STATS. 1971, c. 1307, §§10, 12, at 2597; CAL. STATS. 1967, c. 1398, §37, at 3277; CAL. STATS. 1965, c. 690, §§1, 2, 4, at 2070-71; CAL. STATS. 1965, c. 863, §2, at 2464; CAL. STATS. 1957, c. 456, §8049, at 1434; CAL. STATS. 1943, c. 658, §1, at 2347].

In order to eliminate the preferential status afforded to federal tax liens resulting from the fact that such liens attach at the time the assessment is made, Chapter 481 provides that a state tax lien also attaches when an assessment of state liability is made or when a taxpayer fails to pay the amount due on the date a return is required to be filed [CAL. FISH & GAME CODE §8048(a); CAL. PUB. RES. CODE §3772(a); CAL. REV. & TAX. CODE §§6757(a), 7872(a), 8996(a), 16063(a), 18881(a), 26161(a), 30322(a), 32363(a); CAL. UNEMP. INS. CODE §1703(a)]. The United States Supreme Court has recognized that if a state tax lien is created under a statute modeled after the federal statute, then a competing federal lien does not have priority over the state lien and the principal that "the first in time is the first in right" must be applied [*See* United States v. Vermont, 377 U.S. 351, 358-59 (1964)]. In light of the express priority given to the payment of indebtedness owing to the federal government, the Supreme Court and subsequent decisions of lower federal courts have noted that federal tax liens lack priority over the tax liens of subordinate governmental entities only in cases in which the tax debtor was *solvent* [United States v. Vermont, 377 U.S. 351, 358 (1964); *see, e.g.*, Hinkley & Donovan v. Paine, 424 F. Supp. 1013, 1015 (D.N.H. 1977), United States v. Davis, 247 F. Supp. 84, 88 (E.D. Mich. 1965); 31 U.S.C. §191 (1970)]. When the tax debtor is *insolvent* the indebtedness to the federal government must be satisfied before a state tax lien issued pursuant to Chapter 481 may be satisfied [*See* United States v. Vermont, 377 U.S. 351, 358 (1964). *But see* Thriftway Auto Rental Corp. v. Herzog, 457 F.2d 409 (2d Cir. 1972)]. Thus, by bringing the time at which a state tax lien attaches to the property of the tax debtor into parity with the federal provision, Chapter 481 results in the

application of the "first in time, first in right" principle when there is a federal tax lien competing with a state tax lien and the tax debtor is solvent.

See Generally:

1) 2 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§344-345 (state tax liens) (2d ed. 1970).
2) 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* §§160-178 (state tax liens) (8th ed. 1974), (Supp. 1976).

Civil Procedure; mechanic's lien—preservation of arbitration rights

Code of Civil Procedure §1281.5 (new).
AB 322 (Bannai); STATS 1977, Ch 135
Support: State Bar of California

Prior to the enactment of Chapter 135, the effect of filing a mechanic's lien, or an action to enforce such a lien, upon a contractual arbitration provision was uncertain [*See* STATE BAR OF CALIFORNIA, SPECIAL COMM. ON ARBITRATION INTERIM REPORT at 4 (March 1976)]. Apparently, the mere filing of a claim for a mechanic's lien could have constituted a waiver of any contractual right to arbitration [*See* Palm Springs Homes, Inc. v. Western Desert, Inc., 215 Cal. App. 2d 270, 276, 30 Cal. Rptr. 34, 38 (1963); Annot., 73 A.L.R. 3d 1066, 1071 n.17 (mechanics' liens and arbitration rights) (1976)]. Furthermore, an action brought to foreclose a lien was generally deemed a waiver of arbitration rights [*See* Titan Enterprises, Inc. v. Armo Constr., Inc., 32 Cal. App. 3d 828, 832, 108 Cal. Rptr. 456, 459 (1973); Annot., 73 A.L.R. 3d 1066, 1071-72 (mechanics' liens and arbitration rights) (1976)]. The California Court of Appeal, however, in *Homestead Savings and Loan Association v. Superior Court* [195 Cal. App. 2d 697, 16 Cal. Rptr. 121 (1961)] appeared to reach contrary conclusions on both of these issues by holding that the plaintiff had not waived his arbitration rights by either filing a mechanic's lien or bringing an action to foreclose the lien [*Id.* at 701, 16 Cal. Rptr. at 122-23]. The conclusions reached in *Homestead* have been distinguished from holdings in subsequent cases based upon the fact that in *Homestead* the plaintiff had requested a stay in his action for foreclosure of a mechanic's lien pending the completion of the contractually required arbitration process [*See* Titan Enterprises, Inc. v. Armo Constr., Inc., 32 Cal. App. 3d 828, 832-33, 108 Cal. Rptr. 456, 459 (1973); Palm Springs Homes, Inc. v. Western Desert, Inc., 215 Cal. App. 2d 270, 276, 30 Cal. Rptr. 34, 38 (1963); STATE BAR OF CALIFORNIA, SPECIAL COMM. ON ARBITRATION INTERIM REPORT, Exhibit B at 1, 3 (March 1976)]. Thus, under the prior law the filing of a mechanic's lien or an action to enforce such a lien in California was sometimes deemed

a waiver of the right to arbitrate [*See* STATE BAR OF CALIFORNIA, SPECIAL COMM. ON ARBITRATION INTERIM REPORT, Exhibit B at 3 (March 1976)].

Furthermore, based upon this same case law, it would appear that claimants seeking to recover the value of materials and services were previously faced with an onerous dilemma. In order to enforce mechanics' liens, claimants are generally required to record a claim of lien within 90 days after the completion of work [*See* CAL. CIV. CODE §§3115, 3116] and must ordinarily bring an action to foreclose such a lien within 90 days of recordation to preserve this lien [*See* CAL. CIV. CODE §3144]. At the same time these claimants were frequently confronted with contract provisions requiring that certain disputes growing out of the contract be submitted to arbitration [*See* Annot., 73 A.L.R.3d 1066, 1068 (mechanics' liens and arbitration rights) (1976)]. Thus, in light of the case law discussed earlier, claimants were required to choose between the apparently mutually exclusive options of preserving their lien or complying with their contractual obligation to arbitrate. Not only did the prior law pose this dilemma to potential claimants, but it also resulted in the conflict of two separate public policies: (1) encouraging arbitration as opposed to litigation, which imposes a greater burden on both the litigants and the courts; and (2) protecting the right of a claimant to security for payment for work performed or materials supplied [*Id.*].

Chapter 135 has apparently been enacted to now allow lien claimants to comply with their obligation to arbitrate while preserving their mechanics' liens. This new law provides that any person who now records a mechanic's lien does not thereby waive any right to arbitration that such person may have pursuant to a written agreement [*See* CAL. CIV. PROC. CODE §1281.5]. When filing an action to enforce a mechanic's lien, however, a claimant must now simultaneously present to the court an application requesting that such action be stayed pending arbitration of any issue, question, or dispute that is claimed to be arbitrable under an arbitration agreement and that is relevant to the action to enforce the claim of lien [*See* CAL. CIV. PROC. CODE §1281.5]. By thus indicating an intent to comply with the arbitration provisions, claimants make clear that they have no desire to violate, avoid, or waive any arbitration terms in their contract while employing other legal means to obtain payment for services rendered [*See* Homestead Sav. & Loan Ass'n v. Superior Court, 195 Cal. App. 2d 697, 701, 16 Cal. Rptr. 121, 123 (1961)]. In addition, the claimant is permitted to join with this application any claim of lien that is within the jurisdiction of a municipal court [CAL. CIV. PROC. CODE §1281.5]. Thus, Chapter 135 would appear to encourage arbitration by mechanic's lien claimants while preserving their right to collect payment for materials tendered and services rendered, by providing that filing or enforcing such a lien does not constitute a waiver of

any contractual right or obligation to submit the disputed payment issue to arbitration.

See Generally:
1) M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION §26.04 (mechanic's lien as arbitration waiver) (1968); (Supp. 1977).
2) S. EAGER, THE ARBITRATION CONTRACT AND PROCEEDINGS §51 (mechanic's lien as arbitration waiver) (1971).

Civil Procedure; bail bond forfeiture and small claim court procedure

Code of Civil Procedure §120.4 (new); §116.4 (amended);
Penal Code §1306 (amended).
SB 1107 (Song); STATS 1977, Ch 889
Support: California Judges Association

Prior to the enactment of Chapter 889, if a court declared a bail bond forfeiture but lacked jurisdiction to render a judgment in an action arising upon a contract of similar nature and amount, such court was required to deliver the bond and a certified copy of its order declaring the bond forfeited to the district attorney or civil legal advisor of the board of supervisors of the county in which the court is located [CAL. STATS. 1969, c. 1194, §3, at 2329]. The district attorney or county legal advisor was then required to immediately file the bond and a certified copy of the forfeiture in a court that had jurisdiction to render a judgment in such an action [CAL. STATS. 1969, c. 1194, §3, at 2329]. Chapter 889 has amended Section 1306 of the Penal Code to now permit any superior, municipal, or justice court that has declared the forfeiture of a bail bond to enter a summary judgment against each bondsperson named in the bond in the amount for which the bondsperson has bound himself or herself, regardless of the amount of the bail [CAL. PENAL CODE §1306]. This amendment to the Penal Code will arguably simplify and expedite the procedure for entering summary judgment against a bondsperson after a bond has been forfeited.

Chapter 889 also enacts provisions that modify the procedures and administration of small claims courts. Formerly, when a plaintiff filed an action in small claims court, the judge or clerk was required to sign an order directing the defendant to appear on the hearing date and a copy of this order was sent to the defendant and no other option was available to the judge or clerk [*See* CAL. STATS. 1976, c. 1289, §2, at —]. Chapter 889 provides that a small claims court judge or clerk may now, in the alternative, cause a copy of the claim to be mailed to the defendant and upon proof of service, sign an order setting the hearing date and cause this hearing order to be served upon both the defendant and plaintiff [CAL. CIV. PROC. CODE §116.4(b)(2)]. The methods of service available in small claims court have been limited by

other legislation enacted in this session to: (1) personal service; (2) service by mail; (3) service by leaving a copy of the summons and complaint at the defendant's home; and (4) service by leaving a copy of the summons and complaint at the defendant's place of business [*See* CAL. STATS. 1977, c. 46, §1, at —]. Regardless of whether the hearing date is set before or after a defendant is served by mail with notice of the claim against him or her, this date is to be set ten to 40 days after the date of receipt of the proof of service, or if the defendant resides outside the county, 30 to 70 days after the receipt of the proof of service [CAL. CIV. PROC. CODE §116.4(b)(2)]. This alternative was arguably added to enable more defendants to receive such notice in time to appear in small claims court actions.

Finally, Chapter 889 permits the Judicial Council to provide by rule for the necessary court attachés and employees to implement the provisions governing an experimental project involving a modified small claims court procedure [CAL. CIV. PROC. CODE §120.4. *See generally* CAL. CIV. PROC. CODE §§120-122.2]. Thus, the various changes enacted by Chapter 889 provide an efficient bond forfeiture procedure, which permits the court that declares a forfeiture to retain jurisdiction regardless of the amount of the bail, permits a judge or clerk of a small claims court to notify the defendant of a claim *before* a hearing date is set, and allows the Judicial Council to furnish the necessary support personnel for experimental programs in the small claims courts.

See Generally:

1) B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Proceedings Before Trial* §163 (procedure of bail bond forfeiture) (1963), (Supp. 1977).
2) 1 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§189, 190, 192, 193 (small claims court) (2d ed. 1970); §§187B (small claims court experimental project), §§191A, 192A (small claims court) (Supp. 1975).
3) 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 389 (small claims court) (1978).
4) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 241 (small claims court) (1977).

Civil Procedure; small claims court

Code of Civil Procedure §§116.4, 116.6, 117.3, 117.4 (amended).
AB 317 (Chel); STATS 1977, Ch 46
(Effective May 14, 1977)
Support: State Bar of California

Chapter 46 has been enacted to make several evidentiary and procedural changes in the law governing small claims courts. Due to an apparent omission in legislation passed in 1976, the law allowed only a party to the action to participate in the prosecution or defense of his or her case in small claims court [CAL. STATS. 1976, c. 1289, §2, at —]. This provision apparently precluded the introduction of any evidence in a case without the

presence of the actual party to the action [*See* CAL. STATS. 1976, c. 1289, §2, at —]. Pursuant to Chapter 46, a party is once again permitted to send a representative (other than an attorney), such as a bookkeeper or an accountant, in his or her place to introduce evidence of an account, which must fall within the business records exception to the hearsay rule to be admissible [CAL. CIV. PROC. CODE §117.4. *See generally* CAL. EVID. CODE §§1270, 1271].

Prior to enactment of Chapter 46, service of process in small claims court could be completed in any manner authorized by law [CAL. STATS. 1976, c. 1289, §2, at —]. The law now specifically lists the following methods of service as the only ones that may be used by small claims courts: (1) personal service; (2) service by mail; (3) service by leaving a copy of the summons and complaint at the defendant's home; and (4) service by leaving a copy of the summons and complaint at the defendant's place of business [*See* CAL. CIV. PROC. CODE §§116.4, 415.20]. In the small claims courts, when service is to be completed by delivery to a defendant's place of business or abode, pursuant to Section 415.20(b) of the Code of Civil Procedure, Chapter 46 eliminates the requirement that these methods be preceded by diligently attempted personal service [*See* CAL. CIV. PROC. CODE §116.4]. Personal service and service by mail shall be deemed complete on the date of personal service or on the date that the defendant signs the return receipt [CAL. CIV. PROC. CODE §116.4], while service by delivery at the defendant's place of business or abode shall be deemed complete ten days after an additional copy of the summons and complaint are mailed by first-class, prepaid postage to the defendant [*See* CAL. CIV. PROC. CODE §§116.4, 415.20]. Previously, when service was not completed within the time frame required by Section 116.4, the court was not allowed to proceed with the case if the defendant did not personally appear [CAL. STATS. 1976, c. 1289, §2, at —]. This situation required that a plaintiff apply for a new order setting a new hearing date [*See* CAL. STATS. 1976, c. 1289, §2, at —]. Chapter 46 now requires the court to continue the case for at least ten days and cause notice of the continuance to be mailed by first-class mail to any defendant already served but who failed to appear [CAL. CIV. PROC. CODE §116.4].

Formerly, venue in small claims court was, for all purposes, the same as for civil actions filed in justice or municipal court [CAL. STATS. 1976, c. 1289, §2, at —]. Arguably, the treatment of cases in which venue was improperly laid was also the same and, as a result, a transfer to a proper court was on motion of a party and not of the court [*See* CAL. STATS. 1976, c. 1289, §2, at —; CAL. CIV. PROC. CODE §397]. In addition, a plaintiff was required to pay the costs and fees of such a transfer [*See* CAL. STATS. 1976, c. 1289, §2, at —; CAL. CIV. PROC. CODE §399]. The law now permits a

small claims court to dismiss without prejudice or to transfer an action to the proper court *on its own motion*, or on a defendant's motion, without cost to a plaintiff [CAL. CIV. PROC. CODE §116.6].

Finally, prior to the enactment of Chapter 46, when an action in small claims court involved more than one defendant, and one or more defendants were not residents of the county in which the action was brought, the date for the appearance of all the defendants could not be more than 30 days from the date of the order to appear indicated on the summons [CAL. STATS. 1976, c. 1289, §2, at —]. The law now provides that the date for appearance in such a case shall not be more than 70 days or less than 30 days from the date of the order to appear [CAL. CIV. PROC. CODE §117.3]. Other legislation enacted in this session further amends the procedure in small claims court by permitting the court to either set a hearing date and then cause notice to be served upon the defendant or to first cause notice to be served upon the defendant and, then upon proof of service, to set a hearing date [*See* CAL. STATS. 1977, c. 889, §2, at —]. Thus, Chapter 46 would appear to expedite proceedings in small claims courts by allowing, *inter alia*, the introduction of evidence of an account without the presence of the party and the transfer of a case to a court of proper venue on the court's own motion and would generally seem to provide more reasonable procedures for potential parties involved in proceedings in these courts [*See* CAL. CIV. PROC. CODE §§116.4, 116.6, 117.3, 117.4].

See Generally:

1) 1 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§189, 190, 192, 193 (small claims court) (2d ed. 1970); §§191A, 192A (small claims court) (Supp. 1977).
2) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 241 (small claims court) (1977).

Civil Procedure; general written denials

Code of Civil Procedure §431.40 (amended).
SB 158 (Zenovich); STATS 1977, Ch 93
Support: State Bar of California; Western Center on Law and Poverty

Prior to the enactment of Chapter 93, the law permitted a defendant to file a general written denial and a brief statement of any new matter constituting a defense, in lieu of a demurrer or other answer, in any action in which the amount in controversy did not exceed $750, excluding interest [CAL. STATS. 1976, c. 1389, §1, at —]. Prior to 1976, the monetary jurisdictional limit of small claims courts was $500 [CAL. STATS. 1971, c. 572, §1, at 1095]. Thus, two classes of defendants were previously entitled to use this simplified responsive pleading: (1) a defendant in small claims court; and (2) a defendant in municipal or justice court with a demand not exceeding $750

[*See* CAL. CIV. PROC. CODE §§83, 86116.2. *Compare* CAL. STATS. 1976, c. 1389, §1, at — *and* CAL. STATS. 1972, c. 562, §1, at 965 *with* CAL. STATS. 1971, c. 572, §1, at 1095]. In 1976, however, the legislature increased the monetary limit of jurisdiction of small claims courts to $750 [CAL. STATS. 1976, c. 1289, §2, at —]. This change in the law eliminated the distinction between those defendants who used the general written denial in small claims court and those defendants whose demands were formerly too large for small claims court but which did not exceed $750, even though the nature of their claims apparently were such as to make the retention of counsel economically prohibitive [*Compare* CAL. CIV. PROC. CODE §116.2 *with* CAL. STATS. 1976, c. 1389, §1, at — *and* CAL. STATS. 1976, c. 1289, §2, at —].

In an apparent effort to facilitate the ability of laypersons to represent and defend themselves in a lawsuit in other than small claims court and to maintain historical continuity, Chapter 93 has amended Section 431.40 of the Code of Civil Procedure to increase to $1,000 the amount in controversy under which a defendant may use the general written denial [*See* CAL. CIV. PROC. CODE §431.40. *Compare* CAL. STATS. 1972, c. 562, §1, at 965, CAL. STATS. 1951, c. 1737, §52, at 4101, *and* CAL. STATS. 1933, c. 744, §26, at 1848 *with* CAL. STATS. 1971, c. 572, §1, at 1095, CAL. STATS 1949, c. 451, §1, at 795, *and* CAL. STATS. 1933, c. 743, §30, at 1817]. The general written denial for the purpose of Section 431.40 must, as before, be on a form prescribed by the Judicial Council and available at the place of filing, but need not be verified [CAL. CIV. PROC. CODE §431.40(c)]. Additionally, as previously provided, the use of the general written denial pursuant to Section 431.40 does not affect the requirements of law pertaining to cross-complaints of the defendant [CAL. CIV. PROC. CODE §431.40(b)]. Thus, in any action in which the demand, exclusive of interest, or the value of the property in controversy does not exceed $1,000, the defendant at his or her option may file a general written denial and a brief statement of any new matter constituting a defense in lieu of a demurrer or other answer [CAL. CIV. PROC. CODE §431.40(a)].

See Generally:
1) 3 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §903 (new matter constituting a defense) (2nd ed. 1971).
2) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 241 (small claims courts) (1977).
3) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 318 (verified general denial) (1973).

Civil Procedure; blind jurors

Code of Civil Procedure §§198, 205, 602 (amended).
SB 152 (Garcia); STATS 1977, Ch 591

Support: California Association of the Physically Handicapped; National Federation of the Blind; State Bar of California

Opposition: California District Attorneys' Association; California Police Officers' Association

Prior to the enactment of Chapter 591, the law disqualified from jury service any person who was not in possession of his or her natural faculties [CAL. STATS. 1975, c. 172, §1, at 317]. Construing a New York statute on juror qualifications similar to the prior law in California, an appellate court in that state held that a blind person was not possessed of his or her natural faculties [Lewinson v. Crews, 28 App. Div. 2d 111, 112, 282 N.Y.S.2d 83, 85 (1967). *Compare* CAL. STATS. 1975, c. 172, §1, at 317 *with* N.Y. JUD. LAW §596 (McKinney)]. Consequently, it has been argued in this state that a blind person was not in possession of his or her natural faculties within the meaning of California's prior juror competency law [OP. CAL. LEGIS. COUNSEL No. 491, *Blind Jurors* at 2 (Jan. 3, 1977) (copy on file at the *Pacific Law Journal*)]. With the enactment of Chapter 591, however, this prior law has been clarified to provide that no person shall be deemed incompetent to act as a juror *solely* because of the loss of sight in any degree [CAL. CIV. PROC. CODE §§198(2), 205(b)].

Inherent in the constitutionally guaranteed right to a jury trial is the concomitant right of each person to a fair and impartial jury [*See* People v. Diaz, 105 Cal. App. 2d 690, 697, 234 P.2d 300, 305 (1951). *See generally* U.S. CONST. amends. VI, VII, XIV, §1; CAL. CONST. art. I, §7]. The presence of blind persons on a jury, therefore, raises the question of whether there may be a denial of due process because of a denial of the right to a fair and impartial jury. The argument propounded by various state courts is that persons without sight are unable to render a fair and impartial verdict because they are unable to judge the demeanor and deportment of witnesses or evaluate physical evidence [Rhodes v. State, 128 Ind. 189, 196, 27 N.E. 866, 868 (1891); Lewinson v. Crews, 28 App. Div. 2d 111, 113, 282 N.Y.S. 83, 85 (1967); Black v. Continental Casualty Co., 9 S.W.2d 743, 744 (Tex. Ct. Civ. App. 1928)]. Thus, if the testimony and evidence presented does not have its full force on the jurors, a defendant will not have been afforded his or her full rights [Lewinson v. Crews, 28 App. Div. 2d 111, 113-14, 282 N.Y.S. 83, 86 (1967)].

In *Lewinson v. Crews* [28 App. Div. 2d 111, 282 N.Y.S. 83 (1967)], the New York Appellate Court, while conceding that peremptory challenges are inadequate to protect a litigant's right to a fair and impartial trial since they are limited in number, indicated that challenges for cause, unlimited in number, will satisfy the constitutional guarantees of due process and a fair and impartial jury [*See id.* at 114, 282 N.Y.S. at 86]. Chapter 591 appears to provide this constitutional guarantee by providing a challenge for cause if

a defect exists in the visual or auditory functions of a person's body, which satisfies the court that the prospective juror is incapable of performing the duties of a juror in the particular action before the court [CAL. CIV. PROC. CODE §602(2)]. Thus, rather than automatically excluding blind persons from jury duty, Chapter 591 allows the litigants and the court to determine in each case whether such individuals would be capable jurors [*See* CAL. CIV. PROC. CODE §§198(3), 205(b)].

See Generally:
1) Zimmerman v. Carr, 59 Ind. App. 248, 109 N.E. 218 (1915).
2) 4 B. WITKIN, CALIFORNIA PROCEDURE, *Trial* §92 (qualifications of jurors) (2d ed. 1971), (Supp. 1977).
3) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE DURING TRIAL §§5.33-.56 (examination & challenge of jurors) (1963).
4) McLaughlin, *Civil Practice*, 19 SYRACUSE L. REV. 501, 529 (1967-68).

Civil Procedure; competency of interpreters for administrative hearings

Government Code §§11018, 11501.5 (new); §§11500, 11513 (amended).
SB 420 (Garcia); STATS 1977, Ch 1057
(Effective July 1, 1978)
Support: California Department of Motor Vehicles; California Rural Legal Assistance
Opposition: California Franchise Tax Board

Prior to the enactment of Chapter 1057 a party to an administrative hearing who was not proficient in English was required to provide his or her own interpreter [CAL. STATS. 1972, c. 1390, §1, at 2887]. If the hearing officer so directed, the agency having jurisdiction over the matter was required to pay for the interpreter, otherwise the cost of these services had to be paid by the party providing the interpreter [CAL. STATS. 1972, c. 1390, §1, at 2887]. Chapter 1057 substantially amends these provisions for specified state agencies to require that an interpreter *be provided* at an adjudicatory hearing for a party who is not proficient in English and who requests the language assistance of an interpreter [CAL. GOV'T CODE §11513(d)]. "Adjudicatory hearing" is defined by Chapter 1057 as a hearing conducted by a state agency that involves the personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual; provided that the hearing includes at least sworn testimony, the right to cross examination, the right to representation, and the issuance of a formal decision [CAL. GOV'T CODE §11500(f)]. Specifically excluded from the term "adjudicatory hearing" are informal factfinding or investigatory hearings, with the provision of an interpreter at such proceedings being discretionary [CAL. GOV'T CODE §11500(f)]. Further, "[l]anguage assistance" is defined for the purposes of

the new law as the oral interpretation or written translation of English into another language, and its translation back again, for an individual who cannot speak or understand English, or who has difficulty in so doing [CAL. GOV'T CODE §11500(g)].

Under the new law, the hearing officer retains his or her discretion as to which party shall bear the cost of the interpreter's services, but the officer is now required, when making such a determination, to take into account "an equitable consideration of all the circumstances in each case, such as the ability of the party in need of interpreter to pay" [CAL. GOV'T CODE §11513(d)]. This particular provision, however, is not applicable to proceedings of the Workmen's Compensation Appeals Board or the Division of Industrial Accidents concerning workers' compensation claims [CAL. GOV'T CODE §11513(d)]. These agencies are required to promulgate their own regulations for apportioning the cost of such an interpreter [CAL. GOV'T CODE §11513(d)]. Chapter 1057 further requires the State Personnel Board to establish criteria for testing an interpreter's compentency, both spoken and written, in English and the appropriate second language [CAL. GOV'T CODE §11513(d)(1)]. In addition, the employing agency is required to establish testing procedures to ensure an interpreter's familiarity with the requisite technical terminology and relevant hearing procedures [CAL. GOV'T CODE §11513(d)(2)]. Once the interpreter has successfully completed both examinations, he or she is deemed to be approved by the hearing officer [CAL. GOV'T CODE §11513(e)]. Furthermore, *all* state agencies that conduct administrative hearings must comply with these provisions [CAL. GOV'T CODE §11018] and are required to advise each party of his or her right to an interpreter, and to encourage those individuals in need of an interpreter to give timely notice of such need [CAL. GOV'T CODE §11513(g)]. The interpreter utilized in these proceedings may not have been involved in the case prior to the hearing and all agency rules of confidentiality equally apply to the interpreter, whether or not such rules specifically refer to the interpreter [CAL. GOV'T CODE §11513(h), (i)]. In situations in which the qualified interpreter cannot attend the hearing, or for which there is no qualified interpreter available, the hearing officer has discretionary authority to "provisionally" qualify other interpreters [CAL. GOV'T CODE §11513(f)]. In summary, Chapter 1057 has removed from the parties to an adjudicatory hearing the burden of providing a language interpreter and has also provided a method of certification of the competency of such interpreters.

See Generally:
1) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 332 (interpreters) (1973).

Civil Procedure; order of restitution in administrative adjudications

Government Code §11519 (amended).
AB 1575 (Mori); STATS 1977, Ch 680
Support: California Department of Motor Vehicles
Opposition: California Realtors Association

Pursuant to the California Administrative Procedure Act [CAL. GOV'T CODE §§11370-11528], a private party who has been damaged as a result of a breach of contract by a licensee subject to this act, may initiate a proceeding to have that individual's license revoked, suspended or modified [*See* CAL. GOV'T CODE §11503]. The written decision of the hearing officer in such an action becomes final 30 days after the licensee-respondent is notified of the decision unless: (1) a reconsideration is ordered; (2) the enforcing agency orders the decisions to be effective at an earlier date; or (3) a stay of execution is granted [CAL. GOV'T CODE §11519(a)]. If a stay of execution is granted, it may be accompanied by an express condition that the licensee-respondent comply with specified terms of probation; the terms of which must be just and reasonable in light of the findings and the decision [CAL. GOV'T CODE §11519(b)]. Prior to the enactment of Chapter 680, however, there was no authority to order a licensee, as a condition of probation, to make restitution for damages caused by his or her breach of contract [*See* CAL. STATS. 1976, c. 476, §1, at —].

Section 11519 of the Government Code, as amended by Chapter 680, now provides administrative hearing officers with the authority to include an order of restitution as a term of probation in a stay of execution [CAL. GOV'T CODE §11519(d)]. This section further requires that any decision containing such an order as a condition of probation must include findings that a breach occurred and must specify the amount of actual damages sustained as a result of such a breach [CAL. GOV'T CODE §11519(d)]. Finally, the amount paid by a licensee-respondent pursuant to this order of restitution must be credited against any judgment rendered against the licensee in a subsequent civil action based on the same breach [CAL. GOV'T CODE §11519(d)].

Normally, the recovery of restitutionary damages resulting from a breach of contract requires lengthy and costly litigation in state courts [*See* 4 B. WITKIN, CALIFORNIA PROCEDURE, *Judgement* §§101-108 (pre-trial, trial & post-trial expenses) (2d ed. 1971); JUDICIAL COUNCIL OF CALIFORNIA, 1975 JUDICIAL COUNCIL REPORT TO THE GOVERNOR AND LEGISLATURE 99-101 (1975) (elapsed time to trial)]. The changes implemented by Chapter 680, however, appear to provide relief outside this costly litigation process to persons aggrieved by a breach of contract when the breach is committed by a person licensed by an agency subject to the California Administrative

Procedure Act [*See* CAL. GOV'T CODE §11519]. Although disciplinary action for breach of contract is not uncommon [*See* Moss, *Protecting a Contractor's License in an Administrative Disciplinary Proceeding*, 46 L.A. B. BULL. 338, 341-43 (1971)], the revocation or suspension of a licensee-respondent's license would seem to be of marginal relief to the private citizen who suffered money damages. Thus, by granting administrative hearing officers the power to issue orders of restitution, Chapter 680 would appear to provide aggrieved consumers with more tangible and expedient relief than was previously available and to establish an additional deterrent against breach of contract by specified licensees.

See Generally:

1) 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§321-328 (California administrative law) (8th ed. 1974).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE AGENCY PRACTICE §§4.33, .44, .45 (post-hearing procedures) (1970).
3) Molinari, *California Administrative Process: A Synthesis Updated*, 10 SANTA CLARA LAW. 274 (1969-70).